95-1159

Supreme Court, U.S.
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No. 95-___

In The

Supreme Court of the United States

October Term, 1995

NANSAY HAWAII, INC.,

Petitioner,

v.

PUBLIC ACCESS SHORELINE HAWAII,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Hawai'i

PETITION FOR A WRIT OF CERTIORARI

ROY A. VITOUSEK, III
Counsel of Record
CADES, SCHUTTE, FLEMING & WRIGHT
Suite B-303 Hualalai Center
75-170 Hualalai Road
Kailua Kona, Hawai'i 96740
(808) 329-5811

DAVID J. BEDERMAN
Of Counsel
Gambrell Hall
Atlanta, Georgia 30322-2770
(404) 727-6822

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

1. By retroactively enlarging native Hawaiian customary gathering privileges has the Hawai'i Supreme Court infringed pre-existing property rights in violation of the Due Process Clause?

2. Has Petitioner's property, which has had impressed upon it an expanded native Hawaiian gathering servitude, been the subject of a physical occupation compensable under the Takings Clause?

LIST OF PARTIES

The parties to the proceeding below were the Petitioner, Nansay Hawaii, Inc., joined by the Hawai'i County Planning Commission, and by Fred Y. Fujimoto (as its Chairman). Adverse were Public Access Shoreline Hawaii, by and through its coordinator, Jerry Rothstein, and Angel Pilago.

Briefs were filed *amicus curiae* by the State of Hawai'i, the Office of Hawaiian Affairs, the Kona Hawaiian Civic Club, Ka Lahui Hawai'i, the Land Use Research Foundation, the Pele Defense Fund, the 'Ohana Council, and Protect Kohanaiki 'Ohana, Inc., Kalamaula Homestead Association, Native Hawaiian Environmental Defense Fund.

RULE 29.6 LIST

Nansay Hawaii, Inc., is a subsidiary of Nansay International, Inc., which is a subsidiary of Nansay Corporation, a Japanese corporation. Nansay Hawaii, Inc. is the parent of Makalei Plantations, Inc., and the general partner of two limited partnerships, O'uli Hawaii Properties, and Puako Hawaii Properties.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Nansay Hawaii, Inc., respectfully prays that a writ of certiorari issue to review the August 31, 1995, opinion and the September 20, 1995, judgment of the Supreme Court of Hawai'i.

OPINIONS BELOW

The opinion of the Hawai'i Supreme Court dated August 31, 1995, is reported at 79 Hawai'i 425, and at 903 P.2d 1246 (Hawai'i 1995), and is reprinted in the Petition Appendix ("App.") beginning at App. p. 1a.

The Hawai'i Supreme Court's Judgment dated September 20, 1995, has not yet been reported, and is reprinted at App. pp. 121a-125a.

The opinion of Hawai'i's Intermediate Court of Appeals, dated January 28, 1993, appears at 79 Hawai'i 246, and at 900 P.2d 1313 (Hawai'i App. 1993), and is reprinted at App. pp. 64a-82a.

The Findings of Fact, Conclusions of Law, and Order of the Hawai'i Third Circuit Court, Ibarra, J., of June 7, 1991, is unreported, and appears at App. pp. 83a-88a.

Hawai'i County Planning Commission's decision approving Nansay Hawaii, Inc.'s application, Special Management Area Use Permit No. 305, set forth in its letter of November 19, 1990, to Roy A. Vitousek III (attorney representing Nansay Hawaii, Inc. in its application to the Hawai'i County Planning Commission), as amended and supplemented by letter dated November 29, 1990,

from Hawai'i County Planning Commission to Roy A. Vitousek III, as shown at App. pp. 89a-120a.[1]

STATEMENT OF JURISDICTION

Petitioner seeks review of the Hawai'i Supreme Court's August 31, 1995 opinion and September 20, 1995 judgment. An Application for Extension of Time to file this Petition was granted by this Court, pursuant to S. Ct. R. 13.5, on December 5, 1995. The United States Supreme Court has jurisdiction to review cases from state courts by virtue of 28 U.S.C. § 1257(a).

To the extent that this Petition challenges the constitutionality of provisions of the Hawai'i Constitution and of Hawaiian statutes, the participation of the State of Hawai'i in this case, under 28 U.S.C. § 2403(b), may be called for.

Pursuant to S. Ct. R. 29.4(c), this Petition is being served upon the Attorney General of the State of Hawai'i. The State of Hawai'i appeared as *amicus curiae* in the proceedings below.

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[1] It is the custom and procedure for the Hawai'i County Planning Commission to issue its decision respecting an application for a special management area use permit in the form of a letter to the applicant or applicant's counsel.

FEDERAL AND STATE CONSTITUTIONAL PROVISIONS AND STATE STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

Section One of the Fourteenth Amendment to the United States Constitution provides

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article XII, section 7 of the Hawai'i Constitution of 1978 provides that

> The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and

> possessed by ahapua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

Hawaii Revised Statutes section 1-1 (Supp. 1992), provides that

> The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage; provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State.

Hawaii Revised Statutes section 7-1 (Supp. 1992), provides that

> Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided that this shall not be applicable to wells and

watercourses, which individuals have made for their own use.

STATEMENT

1. This case hinges on Hawai'i's uneasy accommodation between common law principles of land tenure and native Hawaiian historical attitudes toward private property. The court below in its decision traces the history of Hawaiian customary rights in property. *Public Access Shoreline Hawaii v. Hawai'i County Planning Comm'n* [hereinafter *"PASH"*], 903 P.2d 1246, 1258-71; App. at 23a-59a.

a. The decisive moment in the transformation of the Hawaiian doctrine of customary native gathering rights can probably be taken as the 1978 adoption of a new Hawaiian Constitution. One of its provisions allowed that

> The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahapua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1779, subject to the right of the State to regulate such rights.

Haw. Const. art. XII, § 7.

Prior to 1978, there were two statutory enactments concerning customary and traditional rights. Both were of quite old vintage, dating back to the time that Hawai'i

was a constitutional monarchy.[2] One statute specifically dealt with gathering rights. It provided that:

> people . . . shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use. The people shall also have a right to drinking water, and running water, and the right of way.

Haw. Rev. Stat. § 7-1 (1988) (codifying Act of July 11, 1851, *reprinted in Laws of His Majesty Kamehameha III, King of the Hawaiian Islands 98-99 (1851)*). The second statute was of a much more general character, a reception statute of sorts for Hawai'i:

> The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawai'i in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, *or established by Hawaiian usage*. . . .

Haw. Rev. Stat. § 1-1 (codifying 1892 Haw. Sess. Laws ch. 57, § 5) (emphasis added). Prior to the 1978 Constitution, these earlier statutory enactments had not been interpreted by Hawaiian courts to grant preferential land rights to native Hawaiians.[3]

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[2] Between 1795 and 1893 Hawai'i was an absolute, and then a constitutional monarchy. The monarchy was overthrown and replaced by an independent Republic in 1893 which subsisted until 1898, at which time Hawai'i was annexed as a territory of the United States.

[3] They had been invoked to prescribe the conditions under which boundaries between public and private property would

b. This changed as art. XII, § 7 of the Hawai'i Constitution came under expansive judicial interpretation. The first occasion was in *Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 656 P.2d 745 (1982), where at issue was a claim by native Hawaiians to enter a landowner's undeveloped property in exercise of their customary gathering rights. The key point made by the *Kalipi* court was that art. XII, § 7 of the Hawaii Constitution and Haw. Rev. Stat. § 7-1 both limit their application to the inhabitants of the particular "ahupua'a," a land division running from the mountains down to the coast. *See id.* at 748-50.[4] In *Kalipi*, the Hawai'i Supreme Court held that native Hawaiian gathering rights did not preclude a landowner from developing his property in a way that might later interfere with those rights. *See id.* at 749 n.2.

The *Kalipi* Court was also careful to give credence only to those "native understandings and practices which did not unreasonably interfere with the spirit of the common law." *Id.* at 751. Moreover, "the Hawaiian usage exception in § 1-1 may be used as a vehicle for the

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be demarcated. *See*, e.g., *In the Matter of Ashford*, 50 Haw. 452, 440 P.2d 76 (1968); *State v. Zimring*, 52 Haw. 472, 479 P.2d 202, 203-04 (1970).

[4] The classic ahupua'a is a pie-shaped division of land running from the mountains to the sea. On volcanic islands this division allows residents of each ahupua'a access to the range of climatic and biological zones occurring from the nearshore waters to the mountain forests. This in turn enabled residents to obtain fish and ocean products in the nearshore waters, to farm in the mid-level elevations and to obtain necessary forest products in the higher elevations. *See*, e.g. *In the Matter of the Boundaries of Pulehunui*, 4 Haw. 239, 241 (1879).

continued existence of those customary rights which continued to be practiced and which worked no actual harm upon the recognized interests of others." *Id.* at 751-52.

This carefully wrought compromise started to unravel in *Pele Defense Fund v. Paty*, 73 Haw. 578, 837 P.2d 1247 (1992). At issue in that case were purported gathering rights which were associated with residence in an ahupua'a but actually exercised in an abutting ahupua'a. The members of the claimant in *Pele* asserted that they were residents of an ahupua'a which abutted the Wao Kele 'O Puna rain forest. The Hawai'i Supreme Court reversed a summary judgment granted in favor of the landowner as follows: ("We therefore hold that native Hawaiian rights protected by article XII, § 7 [of the Hawai'i Constitution] may extend beyond the ahupua'a in which a native Hawaiian resides where such rights have been customarily and traditionally exercised in this manner.").

While the *Pele* court recognized the possibility that gathering rights may extend beyond the ahupua'a, it reaffirmed the essential connection between gathering rights and ahupua'a tenancy and specifically reaffirmed that even extra-ahupua'a gathering rights could not abridge the landowner's right to improve and develop his property. *See id.* at 1247. *See* also *Pai 'Ohana v. United States*, 875 F. Supp. 680, 692 (D. Haw. 1995).

2. a. Your Petitioner, Nansay Hawaii, Inc. ("Nansay"), owns property on the Big Island of Hawai'i, which it wished to develop into a residential and resort community. In 1990, Nansay initiated the process of acquiring

the final discretionary permit for its development, a Special Management Area Use Permit from the County of Hawai'i Planning Commission (the "Commission"). *See PASH*, 903 P.2d at 1250; App. at 3a-4a. At a Commission hearing, Public Access Shoreline Hawaii (a group representing public beach access interests, hereinafter "Public Access"), along with a Mr. Angel Pilago, sought to intervene in opposition to the grant of the permit. After two hearings at which Public Access and Pilago were repeatedly asked by the Commission to explain how and why their interests were clearly distinguishable from the general public's interest, leave to intervene was denied by the Commission.[5] The Commission then granted Nansay's permit, a final agency action for purposes of state judicial review. *See PASH*, 903 P.2d at 1254; App. at 13a-14a.

b. Public Access took an appeal of the Commission's decision barring its intervention in the proceedings, pursuant to Haw. Rev. Stat. §§ 91-14 & 205A-6. The Hawai'i Circuit Court for the Third Circuit, Ibarra, J., considered additional "evidence" improperly offered by Public Access. *See* Intermediate Court of Appeals (ICA) opinion, 79 Haw. 246, 250, 900 P.2d 1313, 1317 (1993); App. pp. 68a-69a. The Circuit Court reversed the Commission's decision, holding that both Public Access and Mr. Pilago possessed "interests[,] special and personal unto themselves" deriving from traditional gathering rights and religious practices. June 7, 1991 Circuit Court;

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[5] All evidence offered by Public Access relative to purported gathering rights of the members is set out in Appendix 6 at 126a.

App. at 87a. The Commission was thus required to hold a new hearing, in which Public Access and Pilago could participate as contestants.

The Commission and Nansay appealed the Circuit Court's decision to Hawai'i's Intermediate Court of Appeals (ICA). The ICA affirmed, Heen, J., writing, that Public Access had standing to contest Nansay's permit request, but that Pilago did not. 900 P.2d at 1322; App. at 67a-69a, 81a-82a. Pilago did not subsequently seek review of the ICA's decision before the Hawai'i Supreme Court.

Nansay and the Commission petitioned for a writ of *certiorari* to the Hawai'i Supreme Court, then renewed their arguments that Public Access had no standing to participate in Commission proceedings in order to block the issuance of a development permit to Nansay. Nansay further maintained that if an inchoate class of native Hawaiian gatherers were granted an easement to enter its property at will, that such would amount to an unconstitutional deprivation of due process or a taking of property. Nansay's Haw. S. Ct. Petition, App. at 129a-132a; S. Ct. Supplemental Brief, App. at 134a-142a; Second Supplemental Brief, App. at 144a-156a; Third Brief, App. at 158a-163a; Fifth Brief, App. at 165a-173a.

c. The Hawai'i Supreme Court affirmed the ICA's decision, directing that Public Access could contest Nansay's permit request in a proceeding before the Commission. Petitioner does not, of course, seek review before this Court on whether Public Access has standing under Hawaiian administrative law to participate in Commission proceedings except to the extent Public Access' purported standing is based on its members having legal

interests in Nansay's land as a result of the Supreme Court's opinion. Instead, Petitioner challenges the Hawai'i Supreme Court's corollary rulings on the legal nature of native Hawaiian customary gathering rights and how they must be protected under the Hawai'i Constitution and Hawaiian law.

REASONS FOR GRANTING THE WRIT

This Petition comes as the inevitable consequence of this Court's recent property rights jurisprudence. At issue in this case is whether States are at complete constitutional liberty to make retroactive changes in their property law, unexpected changes that frustrate legitimate private interests, and result in actual deprivation of due process and a taking of property in violation of the Fifth and Fourteenth Amendments to the federal Constitution.

The precise context of this case is a series of rulings by the Hawai'i Supreme Court which, culminating in this decision for which review is sought here, vastly expand the scope of native Hawaiian gathering rights. The effect of these decisions is to privilege the exercise of those inchoate servitudes in a manner which profoundly unsettles private rights in property in ways that have not hitherto been encountered in Hawai'i or in any other United States jurisdiction. The Hawai'i Supreme Court has virtually revolutionized Hawaiian property law by these decisions. But instead of acknowledging the due process and takings consequences of these decisions, the Hawai'i courts have chosen to follow the lead of other

jurisdictions by declaring that these changes are "merely" enunciations of unwritten, but pre-existing, customs.

This Petition deliberately presents due process and takings claims as separate questions. The Hawai'i Supreme Court crafted its opinion in a way that might suggest that Nansay's takings claim is currently unripe. Petitioner disagrees with that characterization, but the teaching of this Court's recent property rights decisions in any event advise that the due process and takings claims be separately analyzed. There is certainly no doubt, however, that this Court may entertain a due process claim for an unwarranted and retroactive judicial declaration of a pretextual custom.

I. THE HAWAI'I SUPREME COURT'S RETROACTIVE EXPANSION OF CUSTOMARY NATIVE HAWAIIAN GATHERING RIGHTS IS A DEPRIVATION OF DUE PROCESS.

1. The Hawai'i Supreme Court decision in *PASH* vastly extends the scope of native Hawaiian gathering rights and the enforcement of those rights against private landowners. What the Hawai'i Supreme Court's decision accomplishes in *PASH* is to virtually abolish any checks on the application of Hawai'i's doctrine of customary native rights. Petitioner submits that a State may recognize unwritten, customary property rights, but in order for such rights to be impressed retroactively on private landowners, State judicial decisions must respect the basic contours of the doctrine of custom,[6] as required by the Due Process Clause of the Constitution.

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[6] Custom, as a doctrine in England, was originally intended as a local form of usage. Custom was allowed to exist only to the

Hawai'i jurisprudence has proceeded to strip away these common-law safeguards on the application of customary property rights. Gone are many of the formal elements of Blackstone's formulation, including the requirements of antiquity (*see PASH*, 903 P.2d at 1267-68; App. at 48a, 50a) and consistency with the common law.[7]

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extent that it offended neither statutory enactments nor the common law. The fundamental statement of the English doctrine of custom is found in Blackstone's 1765 *Commentaries on the Laws of England*, and the heart of his analysis of the doctrine was that it implicated "particular customs, or laws, which affect only the inhabitants of particular districts." William Blackstone, *Commentaries on the Laws of England* *74.

The English doctrine of custom was legally constrained by the application of its "necessary requisites" that the custom be of ancient origin, have been enjoyed peaceably without interruption, be reasonable and sufficiently certain in application, be obligatory, and not be inconsistent with other customs or laws. *Id.* at *76-78. *See* also *PASH*, 903 P.2d at 1262 n.26; App. at 33a n.26.

[7] In fact, the *PASH* court took great pains to overrule its much earlier decision, *Oni v. Meek*, 2 Haw. 87 (1858), which had erected these common law constraints on the custom doctrine, noting that

> The court in Oni also appears to have misconstrued other elements of the doctrine of custom by concluding that the custom urged in that case was "so unreasonable, so uncertain, and so repugnant to the spirit of the present laws[.]" 2 Haw. at 90. Contrary to the apparent understanding of the Oni court: (1) "consistency" is properly measured against other customs, not the spirit of the present laws; (2) a particular custom is "certain" if it is objectively defined and applied; certainty is not subjectively determined; and (3) "reasonableness" concerns the manner in which an otherwise valid customary right is exercised – in other words, even if an acceptable rationale cannot be

These doctrinal alterations of custom do not, without more, amount to a due process violation. But when read in the context of two additional changes made by the *PASH* court, the custom doctrine has been distorted in Hawai'i out of all reasonable juridical recognition.

a. As originally enunciated by the Hawai'i Supreme Court in *Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 656 P.2d 745 (1982), native Hawaiian gathering rights were limited to those who lawfully occupied a particular ahupua'a. The holders of such servitudes were thus determinate and clear, as required by the actual provision of the Hawaii Constitution. *See* Haw. Const. art. XII, § 7 ("The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahapua'a tenants . . . "). The *PASH* decision holds that Hawaiian native gathering rights can be exercised irrespective of locality. *PASH*, 903 P.2d at 1260; App. at 29a-30a.

b. Even more ominously, the Hawai'i Supreme Court indicated in *PASH* that native Hawaiian gathering rights, to the extent that they were to be protected by the State (as commanded under the Hawai'i Constitution), *could* result in landowners being prevented from developing or improving their property:

> [W]e refuse the temptation to place undue emphasis on non-Hawaiian principles of land

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assigned, the custom is still recognized as long as there is no "good legal reason" against it. *See* Blackstone's Commentaries at 76-78.

PASH, 903 P.2d at 1268 n.39; App. at 50a-51a n.39.

> ownership in the context of evaluating deliberations on development permit applications. Such an approach would reflect an unjustifiable lack of respect for gathering activities as an acceptable cultural usage in pre-modern Hawai'i, which can also be successfully incorporated in the context of our current culture. Contrary to the suggestion in *Kalipi* that there would be nothing to prevent the unreasonable exercise of these rights, article XII, section 7 accords an ample legal basis for regulatory efforts by the State. . . . In other words, the State is authorized to impose appropriate regulations to govern the exercise of native Hawaiian rights in conjunction with permits issued for the development of land previously undeveloped or not yet fully developed.

PASH, 903 P.2d at 1271-72; App. at 58a-59a (citations omitted).

2. This application of custom rises to the level of a deprivation of due process. Petitioner is mindful that there is a heavy presumption that States are free to prescribe their own law of property. Nevertheless, there must be limits to this freedom. One source of these limits has been in recent Takings Clause decisions.

This problem was anticipated in this Court's landmark decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). There the Court noted that

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed

> use interests were not part of his title to begin with. . . .
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> . . . .
>
> . . . . [If] [t]he use of these properties for what are now expressly prohibited purposes was *always* unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit. . . . When, however, a regulation that declares "off limits" all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.
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> . . . .
>
> . . . . As we have said, a "State, by *ipse dixit*, may not transform private property into public property without compensation. . . . " *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 . . . (1980). Instead, . . . a [state] must identify background principles of nuisance and property law that prohibit the [landowner's] uses. . . .

Id. at 2899 (footnote omitted), 2901-02.

The question raised in this case is whether a court can create a publicly enforced right, based on a reinterpretation of allegedly preexisting custom, and cause the newly recognized right to become part of the State's "background principles of nuisance and property law that prohibit the [landowner's] uses. . . . " If the custom had been part of those principles from the beginning, Nansay never would have had a right to exclude this expanded class of native Hawaiian gatherers or to build

on its property in a way that interfered with those gathering rights. The state would have quite literally took nothing when it judicially declared a broader ambit for native Hawaiian gathering rights. But because the custom only adheres at the time it is given its first, positive recognition in the public law – through a judicial opinion, as in *PASH* – then Nansay's right to exclude this broader class of gatherers has been retroactively abridged, and has suffered a deprivation of due process and is entitled to just compensation.

The *PASH* decision is manifest in its intent to change Hawai'i's law of property. Before *Pele* and *PASH*, native Hawaiians could only enforce their customary gathering rights against property owners if they resided in the same ahapua'a and if the land was not being developed. This was the plain import of Article XII, section 7 of the Hawai'i Constitution. After *PASH*, native Hawaiians can claim inchoate gathering rights irrespective of locality and can block or restrict property development. In short, Hawai'i has impressed a wholly novel and amorphous class of servitudes on property without any sort of notice.

The Hawai'i Supreme Court attempts to justify this decision by declaring that notions of exclusivity in property law are merely "western" impositions on native Hawaiian culture. *See PASH*, 903 P.2d at 1259-61; App. at 26a (quoting *Kalipi*, 656 P.2d at 749); 903 P.2d at 1263; App. at 37a, ("[T]he regulatory power provided in article XII, section 7 [of the Hawai'i Constitution] does not justify summary extinguishment of [customary] rights by the State merely because they are deemed inconsistent with generally understood elements of the western doctrine of 'property.' "). Most tellingly, the court below

holds that "Our examination of the relevant legal developments in Hawaiian history leads us to the conclusion that the western concept of exclusivity is not universally applicable to Hawai'i." *Id.*, 903 P.2d at 1268; App. at 48a-49a (citing *Stevens v. City of Cannon Beach*, 854 P.2d 449, 456 (1993), *cert. denied*, 114 S. Ct. 1332 (1994)).

3. Hawai'i's jurisprudence tracks the experience of a number of States which have embraced the doctrine of custom in property rights as a clever and costless means by which to evade the Just Compensation guarantee and this Court's jurisprudence in such cases as *Lucas*, and even more recently in *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994). Left unchecked, States will simply declare that certain uses of real estate normally allowed under common law principles have been lost by operation of custom, and, when such uses are regulated by the State, due process has not been offended nor has a taking occurred.

This problem was, in much the same garb, addressed recently to the Court in a Petition filed in *Stevens v. City of Cannon Beach*. At issue in that case from Oregon, 317 Or. 131, 854 P.2d 449 (1993), was that State's refusal to issue a permit for development of beach property because to do so would have interfered with a public easement granted via custom.[8] Although this Court decided to deny review in *Stevens*, Justices Scalia and O'Connor did note that "to

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[8] The first judicial pronouncement of the custom (which was made applicable for all the beaches of Oregon, and not just for a particular locality), was in *State ex rel. Thornton v. Hay*, 254 Or. 584, 462 P.2d 671 (1969), decided long after the landowners had acquired their interest in the property.

say this case raises a serious Fifth Amendment takings issue is an understatement." 114 S. Ct. at 1335 (Scalia & O'Connor, JJ., dissenting from the denial of certiorari).

By its decision, the Hawai'i Supreme Court has simply obliterated a constitutional requirement (whether articulated in a takings or due process idiom) that notice must be given to property owners when the government purports to take or transfer significant – and valuable – interests in land. Oregon's and Hawai'i's reliance on the common law principle of custom to accomplish this end may seem quirky, if not downright anachronistic. Nonetheless, it was chosen with great care in *PASH*, which relied upon the Oregon authorities. *See PASH*, 903 P.2d at 1268; App. at 48a-49a.[9]

The danger that this precept poses to this Court's property rights jurisprudence is immense. The power of the customary principle lies in its application to entire classes of property, not just particularized parcels. Once a jurisdiction recognizes that any kind of public right to private property can be acquired via custom, all landowners have been charged with notice that the type of property they own may later become the subject of such a

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[9] The reason lies in the very nature of the customary doctrine. As the Oregon Supreme Court itself explained in *Thornton*, custom was to be preferred to other mechanisms for the acquisition of public rights in private property, such as prescription, dedication, or public trust. Cases brought under such alternative theories, the *Thornton* court opined "could fill the courts for years with tract-by-tract litigation. An established custom, on the other hand, can be proven with reference to a larger region." 462 P.2d at 676.

claim. At least nine other States or territories have recognized such a doctrine.[10] Jurisdictions are likely to find solace in custom precisely because it affords a way to circumvent due process requirements and just compensation guarantees for entire categories of property.

4. Petitioner's due process claim also finds support in a line of cases[11] holding that State courts can deprive

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[10] The following jurisdictions have recognized the application of customary rights in property.

– Florida: *City of Daytona Beach v. Tona-Rama*, 294 So.2d 73, 78 (Fla. 1974) (beach property);

– Idaho: *State ex rel. Haman v. Fox*, 100 Idaho 140, 594 P.2d 1093 (Idaho 1979) (public access to lake-front);

– Maine: *Littlefield v. Maxwell*, 31 Me. 134 (1850);

– Massachusetts: *Freary v. Cooke*, 14 Mass. 488 (1779);

– New Hampshire: *Perley v. Langley*, 7 N.H. 233 (1834) (right of passage); *Nudd v. Hobbs*, 17 N.H. 524 (1845) (same); *Knowles v. Dow*, 22 N.H. 387 (1851) (right to collect seaweed);

– New Jersey: *Post v. Munn*, 4 N.J.L. 61 (1818) (navigation over private fishing grounds);

– Texas: *Matcha v. Mattox*, 711 S.W.2d 95, 98-99 (Tex. Civ. App. 1986) (writ ref'd n.r.e.), *cert. denied*, 481 U.S. 1024 (1987);

– Vermont: *Morey v. Fitzgerald*, 56 Vt. 487, 490 (1884) (right of passage);

– Virgin Islands: *United States v. St. Thomas Beach Resorts, Inc.*, 386 F. Supp. 769 (D.V.I. 1974), *aff'd mem.*, 529 F.2d 513 (3d Cir. 1975) (beach property).

[11] Although tracing its origins back to this Court's decision in *Chicago, Burlington & Quincy R. Co. v. Chicago*, 166 U.S. 226, 235 (1897) and *Muhlker v. New York & Harlem R.R. Co.*, 197 U.S. 544 (1905), the so-called doctrine of "judicial takings" received its fullest and most recent expression in Justice Stewart's concurrence in *Hughes v. Washington*, 389 U.S. 290 (1967), where he noted that

> To the extent that the decision of [a state Supreme Court on a property law question] arguably conforms

landowners of due process when they unexpectedly and retroactively change State property law, and by so doing, transfer important rights in property away from landowners.

Petitioner raised a judicial takings challenge before the Hawai'i Supreme Court. *See PASH*, Nansay's Haw. S. Ct. Second Supplemental Brief, App. at 149a-160a. The Hawai'i Supreme Court derisively rejected it, casting doubt on whether even such a limitation on its judicial authority existed. In any event, the *PASH* court noted,

> Nansay's argument places undue reliance on western understandings of property law that are not universally applicable in Hawai'i. Moreover, Hawaiian custom and usage have always been a part of the laws of this State. Therefore, our recognition of customary and traditional Hawaiian rights . . . does not constitute a judicial taking.

PASH, 903 P.2d at 1272; App. at 61a.

> to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court.

Id. at 296-97 (Stewart, J., concurring). *See* also *Bonelli v. Cattle Co. v. Arizona*, 414 U.S. 313, 331 (1973), *cert. denied*, 488 U.S. 852 (1988); *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977).

Petitioner's submission to this Court is that a judicial takings challenge can be made to a State court pronouncement which purports to so radically change common law expectations of property rights as to constitute a deprivation of property under the Due Process Clause of the Fourteenth Amendment. The Supreme Court of Hawai'i cannot liberate itself from the Due Process Clause and reasonable expectations as to property rights by pejoratively declaring that the common law property principles it no longer wishes to embrace are a relic of colonialism, and "western understandings." The implicit message of the *PASH* decision is that the Hawai'i Supreme Court no longer feels itself bound to respect the process of evolutive change in property rights understood by courts in the rest of the nation.[12] What Petitioner seeks from this Court is clarification of the extent that State courts can retroactively refashion essential principles of common law property in order to avoid the strictures of the Due Process and Takings Clauses.

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[12] If any jurisdiction in the land should be familiar with the judicial takings doctrine, it should be the Supreme Court of Hawai'i. Two of its decisions have been successfully challenged in federal court as being judicial takings. *See Robinson v. Ariyoshi*, 441 F. Supp. 559 (D. Haw. 1977), *aff'd*, 753 F.2d 1468, 1474 (9th Cir. 1985) (considering *McBryde Sugar Co. v. Robinson*, 54 Haw. 174, 504 P.2d 1330 (1973)); *Sotomura v. County of Hawaii*, 460 F. Supp. 473, 483 (D. Haw. 1978) (considering *County of Hawaii v. Sotomura*, 55 Haw. 176, 517 P.2d 57 (1973)).

II. THE HAWAI'I SUPREME COURT'S DECISION HAS RESULTED IN A PHYSICAL OCCUPATION OF LAND, COMPENSABLE UNDER THE TAKINGS CLAUSE AND NOW RIPE FOR REVIEW.

The nub of Petitioner's taking claim is that by newly declaring a broader scope for native Hawaiian customary gathering rights, the State of Hawai'i has coerced the impressment of an easement on its property, extending the grant of such a servitude to an inchoate class of native Hawaiian gatherers. In this respect, the case is analytically indistinguishable from *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987), in which this court struck down a California ordinance which imposed a public easement on beach property without any substantial nexus to a public requirement. Likewise, by virtue of the Hawai'i Supreme Court's decision in *PASH*, Nansay has been made to suffer a physical occupation of its land. The imposition of a customary Hawaiian native gathering servitude is an exercise of eminent domain by the State, requiring just compensation under the Fifth and Fourteenth Amendments, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982), *Nollan*, and *Lucas*. *See* 112 S. Ct. at 2893.

The Hawai'i Supreme Court's decision in *PASH* has transformed native Hawaiian gathering rights into a *permanent* physical occupation of land, thus amounting to a compensable taking. "The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land. 'This element of required acquiescence is at the heart of the concept of occupation.' " *Yee v. City of Escondido*, 503 U.S. 519, 527 (1992) (emphasis in original) (quoting *FCC v. Florida*

Power Co., 480 U.S. 245, 252 (1987)). Such a permanent occupation is created when "individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed." *Nollan v. California Coastal Commission*, 483 U.S. 825, 832 (1987).

Before *PASH*, landowners were not required to acquiesce to gatherers passing to and fro across their land to take its products. Landowners could terminate gathering rights by choosing to develop their land. *Kalipi*, 66 Haw. at 7-8, 10 (gathering rights apply only to "undeveloped land"); *Pele Defense Fund*, 73 Haw. at 618-21, 837 P.2d at 1269, 1270-72 (same). They could with impunity destroy gatherable items and thus destroy any right of would-be gatherers to enter their land. *Id.* at n.36; *Kalipi*, 66 Haw. at n.2. Neither gatherers nor the State could interpose gathering rights to interfere with landowners' development and use of their land. *Id.* By contrast, the *PASH* opinion interprets Haw. Const. Art. XII, § 7, to create a new state constitutional right of self-proclaimed gatherers to block landowners from developing their land if such development would prevent gathering or destroy gatherable items. The State "must protect the reasonable exercise of customary or traditional rights" whenever landowners seek to develop their lands. *PASH*, 903 P.2d at 1271-72; App. at 58a-59a. In short, after *PASH*, Hawai'i landowners can no longer free their land of a continuous stream of "interloper[s] with a government license." *Florida Power*, 480 U.S. at 253. They are required to submit to permanent physical occupation.

There should be no doubt that Petitioner's taking claim for physical invasion of its property[13] is ripe for review. The *PASH* decision is conclusive and final as to the Hawaiian court's rejection of Petitioner's claim that granting a broad right to an inchoate class of native Hawaiian gatherers is unwarranted by custom and imposes an impermissible servitude on land held in fee simple. This holding satisfies the finality requirement of

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[13] Petitioner has never made a regulatory takings claim. It has never asserted that by having its development permit overturned that it has suffered a State-imposed restriction on the use of its property. Petitioner notes that even though the Commission's grant of a development permit was a final agency act under Hawaiian law, *see* Haw. Rev. Stat. § 205A-29, it would not be possible to ascertain the impact of such a permit denial until such time as an inverse condemnation action is pursued.

However, Petitioner would sharply dispute any interpretation of the Hawai'i Supreme Court's decision that suggests that its physical taking claim is unripe. Petitioner has incurred two injuries as a result of the *PASH* decision. The first is that Nansay must suffer the now permanent entrance onto and occupation of its property of an enlarged class of native Hawaiian gatherers. This impairment is immediate and complete. It is the subject of the physical taking claim made here. This claim is ripe. The second injury is that Nansay's development plans for its property may be interfered with to the extent that the Commission may condition permit approval on Petitioner's accommodation of gathering rights. The extent of this interference with Nansay's property rights will remain uncertain until such time as the Commission conducts its remand proceedings. This is a regulatory takings claim which Nansay does not present here.

North Dakota Pharmacy Board v. Snyder's Stores, 414 U.S. 156, 163 (1973).[14]

CONCLUSION

The Petition should be GRANTED.

Respectfully submitted.

ROY A. VITOUSEK, III
Counsel of Record
CADES, SCHUTTE, FLEMING & WRIGHT
Suite B-303 Hualalai Center
75-170 Hualalai Road
Kailua Kona, Hawai'i 96740
(808) 329-5811

DAVID J. BEDERMAN
Of Counsel
Gambrell Hall
Atlanta, Georgia 30322-2770
(404) 727-6822

January 18, 1996

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[14] In any event, the ripeness requirements for regulatory takings claims, enunciated in such cases as *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981); *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); and in *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986), have never been imposed in takings cases involving physical occupations of land. *See Hall v. City of Santa Barbara*, 833 F.2d 1270, 1281 n.28 (9th Cir. 1986), *cert. denied sub nom., City of Santa Barbara v. Hall*, 485 U.S. 940 (1988); *Austin v. City and County of Honolulu*, 840 F.2d 678, 681 (9th Cir. 1988); *Robinson v. Ariyoshi*, 887 F.2d 215, 219 (9th Cir. 1989).

PUBLIC ACCESS SHORELINE HAWAII, by Jerry ROTHSTEIN, its coordinator; and Angel Pilago, Appellants-Appellees-Respondents,

v.

HAWAI'I COUNTY PLANNING COMMISSION, by Fred Y. FUJIMOTO in his capacity as its chairman; and Nansay Hawaii, Inc., a Hawai'i corporation, Appellees-Appellants-Petitioners.

No. 15460.

Supreme Court of Hawai'i.

Aug. 31, 1995.

Roy Vitousek, III (J. Robert Arnett, II, Nani Lee and John P. Powell of Cades, Schutte, Fleming and Wright, with him on the briefs), Honolulu, for Appellee-Petitioner Nansay Hawaii, Inc.

Joseph Kamelamela, Deputy Corporation Counsel (Michael J. Matsukawa with him on the briefs), Hilo, for Appellee-Petitioner Hawai'i County Planning Commission.

Skip Spaulding (Arnold L. Lum, Denise E. Antolini, Eric S. Walters, San Francisco, CA, and Lea O. Hong of Sierra Club Legal Defense Fund, with him on the briefs), Honolulu, for Appellants-Respondents Public Access Shoreline Hawaii and Angel Pilago.

David Kaapu, on the briefs, Kailua Kona, for the Kona Hawaiian Civic Club.

Mililani Trask, Kia'aina, on the briefs, Honolulu, for Ka Lahui Hawai'i.

David L. Callies, Orlando R. Davidson, and Gordon M. Arakaki, on the briefs, Honolulu, for the Land Use Research Foundation.

Carl C. Christensen, Alan T. Murakami, and Paul F.N. Lucas (Native Hawaiian Legal Corporation), on the briefs, Honolulu, for Pele Defense Fund.

Sherry P. Broder and Jon M. Van Dyke, on the briefs, Honolulu, for the Office of Hawaiian Affairs.

Steven S. Michaels and Girard D. Lau, Deputy Attorneys General, on the briefs, Honolulu, for the State of Hawai'i.

Hayden Aluli, on the briefs, Honolulu, for the 'Ohana Council.

Williamson B.C. Chang and David Michael Foulkes, on the briefs, Honolulu, for Protect Kohanaiki 'Ohana, Inc., Kalamaula Homestead Association, and the Native Hawaiian Environmental Defense Fund.

Before MOON, C.J., and KLEIN, LEVINSON, NAKAYAMA and RAMIL, JJ.

KLEIN, Justice.

We issued a writ of certiorari to review the decision of the Intermediate Court of Appeals (ICA) in this case, which concerns a challenge by Public Access Shoreline Hawaii (PASH) and Angel Pilago to the Hawai'i County Planning Commission's (HPC) decision denying them standing to participate in a contested case hearing on an application by Nansay Hawai'i, Inc. (Nansay) for a Special Management Area (SMA) use permit.

In order to pursue development of a resort complex on land within a SMA on the island of Hawai'i (Big Island), Nansay applied to the HPC for a SMA use permit. PASH, an unincorporated public interest membership organization based in Kailua-Kona, and Pilago opposed the issuance of the permit and requested contested case hearings before the HPC. The HPC denied the requests on the ground that, under its rules, neither PASH nor Pilago had standing to participate in a contested case. The HPC subsequently issued a SMA use permit to Nansay. When the case came before the circuit court, the court essentially vacated the permit by remanding to the HPC with instructions to hold a contested case hearing in which both PASH and Pilago would be allowed to participate. In other words, because the SMA permit was granted pursuant to flawed procedures, the circuit court implicitly concluded that the SMA permit was void. On appeal, the ICA affirmed the circuit court's order with respect to PASH and reversed it with respect to Pilago. For the reasons set forth below, we affirm the ICA's decision and remand the case to the HPC for proceedings consistent with this opinion.

I. *BACKGROUND FACTS*

The HPC received a SMA use permit application from Nansay for a resort development on the Big Island. Nansay sought approval of its plans to develop a community complex including: two resort hotels with over 1,000 rooms; 330 multiple family residential units; 380 single family homes; a golf course; a health club; restaurants; retail shops; an artisan village; a child care center; and other infrastructure and improvements over a 450 acre

shoreline area in the ahupua'a[1] of Kohanaiki on the Big Island. On September 28, 1990, the HPC held a public hearing on Nansay's permit application, as required by the agency's rules. *See* County of Hawai'i Planning Commission, Rules of Practice and Procedure (HPC Rules) 9-11(B) (1992).[2] At the public hearing, many parties presented testimony, including Pilago and the coordinator of PASH. Various individuals and groups orally requested contested case hearings.[3]

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[1] An "ahupua'a" is a land division usually extending from the mountains to the sea along *rational* lines, such as ridges or other natural characteristics. *In re Boundaries of Pulehunui*, 4 Haw. 239, 241 (1879) (acknowledging that these "rational" lines may also be based upon tradition, culture, or other factors).

[2] HPC Rule 9-11(B) provides that a "hearing shall be conducted within a period of ninety calendar days from the receipt of a properly filed petition [for a SMA permit] . . . [and] all interested parties shall be afforded an opportunity to be heard." *Id.*

[3] A written petition is not required until twenty days after the HPC determines that contested case procedures are required and publishes notice in a newspaper of general circulation in the county. HPC Rule 4-6(b)(2).

In addition to PASH and Pilago, the HPC also received several requests concerning an alleged prescriptive easement over a jeep trail fronting the development area. The HPC postponed its hearing on Nansay's application for a scheduled sixty days so that these other groups and individuals could resolve the jeep trail issue through mediation or a declaratory action. Prior to reconvening the hearing, the other parties settled their claims with Nansay. Only PASH and Pilago, both of whom apparently did not pursue declaratory actions, had not settled their concerns with Nansay when the HPC resumed its deliberations on Nansay's permit application.

On November 8, 1990, after further testimony and discussion, the HPC determined that PASH and Pilago's interests were "not clearly distinguishable from that of the general public" and, therefore, that they did not have standing to participate in a contested case. *See* HPC Rule 4-2(6)(B).[4] The HPC then voted to deny the contested case requests and to grant Nansay a SMA use permit.

PASH and Pilago sought review in circuit court of both agency decisions (denial of their contested case requests and issuance of the SMA use permit) pursuant to HRS §§ 91-14 and 205A-6 (1985).[5] The circuit court

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[4] HPC Rule 4-2(6)(B) provides in relevant part:

> "Party" . . . includes the following, upon the filing of timely requests [,] . . . [a]ny person who has some property interest in the land, who lawfully resides on the land, or who can demonstrate that that person will be so directly and immediately affected by the [HPC's] decision that that person's interest in the proceeding is clearly distinguishable from that of the general public; provided that such agency or person must be specifically named or admitted as a party before being allowed to participate in a contested case hearing.

[5] PASH and Pilago did not brief or argue jurisdiction under HRS § 205A-6, which permits a civil action alleging failure to comply with the Coastal Zone Management Act, because they believed "that it would have been inconsistent to have attacked the permit itself while still claiming error in the [HPC's] denial of a contested case hearing." *Public Access Shoreline Hawaii v. Hawaii County Planning Comm'n* [*PASH I*], 79 Hawai'i 246, 249 n. 1, 900 P.2d 1313, 1316 n. 1 (App.1993). *See Punohu v. Sunn*, 66 Haw. 485, 487, 666 P.2d 1133, 1135 (1983) (holding that a declaratory judgment action would not lie where a specific remedy was available under HRS § 91-14). However, assuming that the primary jurisdiction doctrine does not apply because the HPC's

determined that the HPC erred in finding that PASH and Pilago did not have interests that were distinguishable from the general public. Accordingly, the court remanded the case with instructions for the HPC to grant PASH and Pilago a contested case hearing pursuant to its rules.

Nansay and the HPC appealed, and the ICA affirmed in part, holding that PASH was entitled to contested case hearing procedures. *PASH I*, at 253, 900 P.2d at 1317. The ICA's conclusion was based on its determination that the HPC "disregarded the rules regarding the gathering rights of native Hawaiians and its obligation to preserve and protect those rights." *Id.* In other words, the ICA determined that PASH's "interest in the proceeding was clearly distinguishable from that of the general public[.]" *Id.*[6] However, the ICA reversed the circuit court with

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decision-making process has concluded and there is no administrative appeal process to pursue, *see The Aged Hawaiians v. Hawaiian Homes Comm'n*, 78 Hawai'i 192, 202, 891 P.2d 279, 289 (1995), the circuit courts would appear to have *original* jurisdiction under HRS § 205A-6 to hear either a procedural or substantive challenge to the agency's action. *Cf. Kona Old Hawaiian Trails v. Lyman*, 69 Haw. 81, 92-94, 734 P.2d 161, 168-69 (1987). This would be the case notwithstanding a particular claimant's designation of the claim as an "appeal" rather than an original action. *In re Eric G.*, 65 Haw. 219, 224, 649 P.2d 1140, 1144 (1982). In the instant case, we need not further discuss PASH and Pilago's claims under HRS § 205A-6 because we decide the issue of jurisdiction under HRS § 91-14. *See infra* section III.

[6] At the hearing before the HPC, Nansay did not directly dispute the assertion that unnamed members of PASH possess traditional native Hawaiian gathering rights at Kohanaiki, including food gathering and fishing for 'ōpae, or shrimp, which are harvested from the anchialline [sic] ponds located on Nansay's proposed development site. *See, e.g.*, HRS § 174C-101

respect to Pilago, explaining that his acknowledged "special" interest in the proceeding was not a sufficiently "personal" interest "clearly distinguishable from that of the general public." *Id.* at 254, 900 P.2d at 1318.

The HPC and Nansay subsequently applied for a writ of certiorari, which we granted on May 7, 1993.

II. *THE RIGHTS OF A NON-APPEALING PARTY*

Appeals from decisions of the ICA are governed by HRS § 602-59 (1985), which provides for an appeal only by application for writ of certiorari. *State v. Bolosan*, 78 Hawai'i 86, 88, 890 P.2d 673, 675 (1995). In the instant case, the ICA ruled against the HPC and Nansay with respect to PASH's claims, and against Pilago with respect to his claims. The HPC and Nansay accordingly filed applications for writs of certiorari.

Notwithstanding our October 28, 1993 order permitting Pilago's counsel to withdraw and allowing PASH's representative to appear as counsel for Pilago, Pilago never filed an application for writ of certiorari from the decision of the ICA. Accordingly, we decline to address Pilago's asserted rights in this opinion.

(Supp.1992) (indicating that "traditional and customary rights shall include, but not be limited to . . . the gathering of [hīhīwai], ['ōpae], ['o'opu], limu, thatch, ti leaf, aho cord, and medicinal plants for subsistence, cultural and religious purposes"). Pilago's similarly *undisputed* concern and interest was that the area of the planned development would destroy important cultural sites, possibly including the burial site of King Kamehameha I.

III. *JURISDICTIONAL REQUIREMENTS*

It is well-settled that "every court must . . . determine as a threshold matter whether it has jurisdiction to decide the issue[s] presented." *Pele Defense Fund v. Puna Geothermal Venture*, 77 Hawai'i 64, 67, 881 P.2d 1210, 1213 (1994). Moreover, subject matter jurisdiction may not be waived and can be challenged at any time. *Bush v. Hawaiian Homes Comm'n*, 76 Hawai'i 128, 133, 870 P.2d 1272, 1277 (1994).

In the instant case, the HPC and Nansay argue that the circuit court lacked jurisdiction to consider PASH's claims. Nansay asserts further that the proper remedy for PASH to pursue was an action for declaratory judgment and/or an injunction, rather than an appeal under HRS § 91-14. PASH contends that the circuit court properly exercised appellate jurisdiction under HRS § 91-14.[7]

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[7] HRS § 91-14(a) (Comp. 1993) provides:

> Any person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under this chapter; but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief, or trial de novo, including the right of trial by jury, provided by law. Notwithstanding any other provision of this chapter to the contrary, for the purposes of this section, the term "person aggrieved" shall include an agency that is party to a contested case proceeding before that agency or another agency.

Although the last sentence of this provision did not become effective until May 20, 1993, *see County of Hawai'i v. Civil Service Comm'n*, 77 Hawai'i 396, 401, 885 P.2d 1137, 1142 (App. 1994),

The necessary inquiry in this case, therefore, is whether PASH has met the requirements of HRS § 91-14: first, the proceeding that resulted in the unfavorable agency action must have been a "contested case" hearing – i.e., a hearing that was 1) "required by law" and 2) determined the "rights, duties, and privileges of specific parties"; second, the agency's action must represent "a final decision and order," or "a preliminary ruling" such that deferral of review would deprive the claimant of adequate relief; third, the claimant must have followed the applicable agency rules and, therefore, have been involved "in" the contested case; and finally, the claimant's legal interests must have been injured – i.e., the claimant must have standing to appeal. *See generally Puna Geothermal, supra.* In the remaining subsections of this part, we shall apply this test to the circumstances presented in this appeal.

A. *Contested Case Hearing*

In *Puna Geothermal,* we observed that "a contested case must have occurred before appellate jurisdiction may be exercised. A contested case is an agency hearing that 1) is required by law and 2) determines the rights, duties, or privileges of specific parties." 77 Hawai'i at 67-68, 881 P.2d at 1213-14 (citations and footnote omitted). In order for a hearing to be "required by law," it

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that fact does not prevent the HPC from appealing an adverse decision by the circuit court to the ICA or to this court. *See Fasi v. Hawai'i Pub. Employment Relations Bd.*, 60 Haw. 436, 442, 591 P.2d 113, 117 (1979).

may be required by statute, agency rule, or constitutional due process. *See id.* at 68, 881 P.2d at 1214.

In the instant case, we need only look to agency rules promulgated under the authority of HRS § 205A-29 to find the hearing requirement.[8] *See* HPC Rule 9-11(B), *supra* note 2. In fact, the respective county planning commissions for all the neighbor islands are authorized under the Coastal Zone Management Act (CZMA), HRS chapter 205A, and in accordance with the Hawai'i Administrative Procedures Act (HAPA), HRS chapter 91, to establish rules governing the grant or denial of a SMA permit.[9] *See,*

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[8] HRS § 205A-29(a) provides, in pertinent part:

> The authority in each county . . . *shall establish* and may amend pursuant to chapter 91, by rule or regulation the [SMA] use permit application procedures, *conditions under which hearings must be held,* and the time periods within which the hearing and action for [SMA] use permits shall occur. . . . Any rule or regulation adopted by the authority shall be consistent with the objectives, policies, and [SMA] guidelines provided in this chapter. Action on the special management permit shall be final unless otherwise mandated by court order.

(Emphases added.)

[9] The Maui Planning Commission Rules of Practice and Procedure (MPC Rules) currently provide for formal intervention (*see* MPC Rules §§ 12-201-39 to -46) and for appeal to the circuit court from denial thereof (*see* MPC Rules § 12-201-46) but make no provision for appeal of a SMA permit decision. Because Maui County Charter § 8.5.4 specifically restricts appeals to the Board of Appeals from those actions concerning "zoning, subdivision and building ordinances[,]" action on a SMA permit by the MPC is final and, therefore, appealable under the HAPA. *See also* Lāna'i Planning Commission Rules (forthcoming, pursuant to Maui County Charter Amendment, as required by 1992

e.g., Chang v. Planning Comm'n, 64 Haw. 431, 436, 643 P.2d 55, 60 (1982). In the City and County of Honolulu, on the other hand, the relevant authority under the CZMA (specifically, the Honolulu City Council) is a legislative body that is exempt from HAPA. *Sandy Beach Defense Fund v. City Council*, 70 Haw. 361, 368, 773 P.2d 250, 255 (1989). No other law requires the Honolulu City Council to hold hearings on SMA applications. *Id.* at 376, 773 P.2d at 260. Similarly, in the County of Hawai'i, hearings are not required under the HPC Rules for cases involving SMA *minor* permit applications. *Kona Old Hawaiian Trails v. Lyman*, 69 Haw. 81, 734 P.2d 161 (1987).[10]

Next, we must determine whether the subject hearing determined the rights, duties, or privileges of a specific party. At this stage of the analysis, our inquiry is properly directed at the party whose application was under consideration by the HPC. *See Puna Geothermal*, 77 Hawai'i at

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General Election Question No. 3, calling for a separate planning commission on Lāna'i).

The Rules of Practice and Procedure for the Moloka'i Planning Commission (Moloka'i PC Rules) currently provide for formal intervention and contested case procedures (*see* Moloka'i PC Rules §§ 12-1-25 to -31), appeal to the circuit court from the denial of intervention (*see id.* § 12-1-31), and "judicial review of [all other] decisions and orders . . . in the manner set forth in HRS § 91-14." *See id.* § 12-1-61.

The Rules of Practice and Procedure of the County of Kaua'i, Planning Commission (KPC Rules) currently provide for formal intervention. *See* KPC Rule 1-4-1. Furthermore, "[a]ny person aggrieved by a final order and decision of the Planning Commission may obtain judicial review thereof in the manner pursuant to HRS [chapter] 91." KPC Rule 1-6-18(i).

[10] HPC Rules 9-10(D) and (E) omit the hearing requirement for SMA minor permit applications.

68, 881 P.2d at 1214; *Bush*, 76 Hawai'i at 136, 870 P.2d at 1280. During the proceeding initiated by the HPC on Sept. 28, 1990 and resumed on Nov. 8, 1990, Nansay "sought to have the legal rights, duties, or privileges of land in which it held an interest declared over the objections of other landowners and residents" of the area, including persons allegedly having constitutionally protected interests on the development site in Kohanaiki. *Puna Geothermal*, 77 Hawai'i at 68, 881 P.2d at 1214; *Mahuiki v. Planning Comm'n*, 65 Haw. 506, 513, 654 P.2d 874, 879 (1982). Consequently, we hold that the SMA use permit application proceeding before the HPC was a contested case.[11]

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[11] Nansay claims that Hawai'i appellate court opinions dealing with judicial review of agency decisions reflect an inconsistent legal analysis. Thus, Nansay suggests that PASH should have pursued alternative judicial measures, such as an action for an injunction or a declaratory judgment, rather than seeking appellate review under HRS § 91-14. *See Bush*, 76 Hawai'i at 136-37, 870 P.2d at 1280-81; *Town v. Land Use Comm'n*, 55 Haw. 538, 557, 524 P.2d 84, 96 (1974) (Ogata, J., dissenting, joined by Richardson, C.J.). The disparity perceived by Nansay between court holdings based on *procedural* and *substantive* errors in agency decision-making merely reflects application of a two-part test for determining whether a particular proceeding was a "contested case" under HRS § 91-1(5). In their dissent, Justices Ogata and Richardson disagreed with the *Town* majority's application of this nascent test. The dissent believed that the agency hearing, although required by law, was not a contested case. *Town*, 55 Haw. at 556-57, 524 P.2d at 96. The dissenting opinion erroneously focused on the appellee's characterization of the hearing as a rule-making procedure. *Id.* at 556, 524 P.2d at 95. The majority, on the other hand, correctly concluded that the process for boundary amendment is not rule-making because it is *"adjudicative of legal rights* of property

B. *Finality for purposes of judicial review under § 91-14*

The second element of our analysis requires us to determine whether PASH appealed from either "a final decision and order . . . or a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief[.]" HRS § 91-14(a). In *Kona Old Hawaiian Trails*, we held that the HPC's "decision to grant a minor permit [was not] 'a final decision or order in a contested case' from which an appeal to court was possible." *Id.* at 90-91, 734 P.2d at 167. In that case, we looked to Hawai'i County Charter section 5-6.3 for the necessary provision granting appeal rights because the HPC Rules do not address judicial review of the grant or denial of a SMA *minor* permit.[12] *Id.* at 91 n. 11, 734 P.2d at 167 n. 11 (providing for appeal to the county zoning board of appeals (ZBA) under section 5-6.3 of the county charter). The appellants in *Kona Old Hawaiian Trails* did not avail themselves of this procedure; therefore, the courts could not properly exercise appellate jurisdiction.

In the instant case, PASH was not required to appear before the ZBA prior to seeking judicial review because HPC Rules 4-6(h) and 9-11(D)(5) provide for direct appeal

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interests in that it calls for the *interpretation of facts applied to rules that have already been promulgated*[.]" *Town*, 55 Haw. at 548, 524 P.2d at 91 (emphasis added).

[12] HRS § 205A-30 requires "specific procedures . . . for the issuance of . . . [SMA] minor permits, . . . and judicial review from the grant and denial thereof."

to the third circuit court.[13] Furthermore, the HPC has already rendered its final views for the purposes of judicial review. *See* HRS § 205A-29, *supra* note 8 (indicating that "[a]ction on the [SMA use] permit shall be final unless otherwise mandated by court order"). Even if we were to accept the Petitioners' claim that PASH does not contest the actual grant of Nansay's SMA use permit, *but see supra* note 5, we would still hold that the circuit court properly exercised its appellate jurisdiction in this case. HPC Rule 4-6(h); *see also In re Hawai'i Gov't Employees' Ass'n*, 63 Haw. at 89, 621 P.2d at 364 (upholding appellate jurisdiction where the agency's preliminary ruling ended the proceedings with respect to a party seeking intervention in a contested case).

C. *Participation, including compliance with agency rules*

Under the third element of our analysis, PASH must demonstrate that it was involved, or participated, in the contested case hearing that culminated in the unfavorable decision. *Puna Geothermal*, 77 Hawai'i at 70, 881 P.2d at 1216 (citing *Bush*, 76 Hawai'i at 134, 870 P.2d at 1278; *Mahuiki*, 65 Haw. at 514-15, 654 P.2d at 879-80). Moreover,

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[13] HPC Rule 4-6(h) provides that "[a]ny petitioner who has been denied standing as a party may appeal such denial to the circuit court pursuant to section 91-14, [Hawai'i] Revised Statutes." The HPC Rules apparently provide an alternative means of obtaining judicial review: "Approval or denial of the petition [for a SMA permit] shall be *final and appealable* to the Third Circuit Court of the State of [Hawai'i] in accordance with Chapter 91, HRS, as amended." HPC Rule 9-11(D)(5) (emphasis added).

"[a]ppellants seeking judicial review under HRS § 91-14 must . . . follow agency rules 'relating to contested case proceedings . . . properly promulgated under HRS Chapter 91[.]' " *Puna Geothermal*, 77 Hawai'i at 67-68, 881 P.2d at 1213-14.

During the September 28, 1990 public hearing held by the HPC, PASH testified against the grant of a SMA use permit for Nansay's proposed development. Pursuant to HPC Rule 4-6(a), PASH also requested implementation of contested case procedures at this hearing as well as at the November 8, 1990 hearing. After the HPC denied its request, PASH sought judicial review under HRS § 91-14 (as directed by HPC Rule 4-6(h) and pursuant to a discussion between the HPC and its deputy corporation counsel).[14] Having followed the procedures set forth by the HPC, PASH's participation in the SMA use permit proceeding amounts to involvement "in a contested case" under HRS § 91-14(a). *See Puna Geothermal*, 77 Hawai'i at 70, 881 P.2d at 1216. The mere fact that PASH was not formally granted leave to intervene in a contested case is not dispositive because it did everything possible to perfect its right to appeal. *See id.* at 71, 881 P.2d at 1217 (discussing *Jordan v. Hamada*, 62 Haw. 444, 616 P.2d 1368 (1980), and *East Diamond Head Ass'n v. Zoning Board*, 52 Haw. 518, 479 P.2d 796 (1971)).

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[14] Counsel for the HPC suggested that if the contested case request were to be denied, PASH "should probably wait for the decision [of the circuit court]; and then the Supreme Court will determine whether [its] participation in the public hearing was sufficient standing for [it] to appeal from that decision."

D. *Standing as a "person aggrieved"*

The remaining element in our jurisdictional analysis requires PASH to "demonstrate [that its] . . . interests were injured[.]" *Puna Geothermal*, 77 Hawai'i at 69, 881 P.2d at 1215. Although the HPC Rules allow formal intervention through specified procedures, PASH was denied standing to participate in a contested case hearing because the agency found that its asserted interests were "substantially similar" to those of the general public. The HPC's restrictive interpretation of standing requirements is not entitled to deference. *See id.* at 67, 70, 881 P.2d at 1213, 1216 (citing *Hawaii's Thousand Friends v. Anderson*, 70 Haw. 276, 283, 768 P.2d 1293, 1299 (1989); *Akau v. Olohana Corp.*, 65 Haw. 383, 388-89, 652 P.2d 1130, 1134 (1982)). *Cf. Mahuiki*, 65 Haw. at 515, 654 P.2d at 880 (recognizing that "a decision to permit the [proposed] construction . . . on undeveloped land in the [SMA] could only have an adverse effect on" the appellants' "essentially aesthetic and environmental" interests).[15]

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[15] We stated in *Akau* that "a member of the public has standing to enforce the rights of the public even though his injury is not different in kind from the public's generally, if he can show that he has suffered an injury in fact, and that the concerns of a multiplicity of suits are satisfied by any means, including a class action." *Akau*, 65 Haw. at 388-89, 652 P.2d at 1134. The necessary elements of an "injury in fact" include: 1) an *actual or threatened* injury, which 2) is traceable to the challenged action, and 3) is likely to be remedied by favorable judicial action. *See Puna Geothermal*, 77 Hawai'i at 70, 881 P.2d at 1216; *accord Pele Defense Fund v. Paty* [*Pele*], 73 Haw. 578, 615, 837 P.2d 1247, 1257-58 (1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1277, 122 L.Ed.2d 671 (1993). In other words, individuals or groups requesting contested case hearing procedures on a SMA permit

Accordingly, we review *de novo* whether PASH has demonstrated that its interests were injured.

We agree with the ICA's thorough assessment of PASH's standing. *See PASH I*, at 251-254, 900 P.2d at 1318-1321. Through unrefuted testimony, PASH sufficiently demonstrated that its members, as "native Hawaiian[s] who [have] exercised such rights as were customarily and traditionally exercised for subsistence, cultural, and religious purposes on undeveloped lands[,] [have] an interest in a proceeding for the approval of [a SMA permit] for the development of lands within the ahupua'a which are [sic] clearly distinguishable from that

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application before the HPC must demonstrate that they will b[e] "directly and immediately affected by the Commission's decision[.]" HPC Rule 4-2(6)(B). However, standing requirements are not met where a petitioner merely asserts "value preferences," which are not proper issues in judicial (or quasi-judicial) proceedings. *Puna Geothermal*, 77 Hawai'i at 70, 881 P.2d at 1216. Although the HPC Rules do not expressly require petitioners to detail the nature of their asserted interests in writing until *after* the HPC has determined whether a contested case hearing is required, *see* HPC Rules 4-6(b) and (c), a petitioner who is denied standing without having had an adequate opportunity to identify the nature of his or her interest may supplement the record pursuant to HRS § 91-14(e).

The cultural insensitivity demonstrated by Nansay and the HPC in this case – particularly their failure to recognize that issues relating to the subsistence, cultural, and religious practices of native Hawaiians amount to interests that are clearly distinguishable from those of the general public – emphasizes the need to avoid " 'foreclos[ing] challenges to administrative determinations through restrictive applications of standing requirements.' " *Mahuiki*, 65 Haw. at 512, 516, 654 P.2d at 878, 880 (quoting *Life of the Land v. Land Use Comm'n*, 63 Haw. 166, 171, 623 P.2d 431, 438 (1981)).

of the general public." *Id.* at 252, 900 P.2d at 1319. Although we hold that PASH sufficiently demonstrated standing to participate in a contested case, at least for the purposes of the instant appeal, we observe that "[o]pportunities shall be afforded all parties to present evidence and argument on all issues involved" in the contested case hearing held on remand. HRS § 91-9(c).

For the reasons discussed in subsections III.A. through D., *supra*, we hold that the circuit court had jurisdiction to determine the issues raised by PASH in this case.

IV. *THE OBLIGATION TO PRESERVE AND PROTECT CULTURAL AND HISTORIC RESOURCES*

Having established the jurisdiction of the courts in this case, we now turn to the substantive arguments advanced by Nansay and the HPC.[16]

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[16] Upon granting certiorari, we allowed the parties to submit supplemental briefs concerning issues raised in the application for writ of certiorari. *See* HRS § 602-59(d). After reviewing these submissions, we then requested additional briefing on the following issues: (1) to what extent should native Hawaiian gathering rights on undeveloped land be protected when that same land is under consideration for development permits, and does the HPC have legal authority to condition a SMA permit on protection of those rights; (2) what criteria should be considered in determining whether the proposed development would infringe upon native Hawaiian rights; and (3) at what point, if any, does the protection of native Hawaiian rights in the land being developed implicate the "Takings Clause" of the Hawai'i and the United States Constitutions? The extensive briefing of these issues included submissions by numerous amici curiae:

Nansay argues that the HPC has no obligation under the CZMA or any other law to consider, much less require, protection of traditional and customary Hawaiian rights. The HPC concurs, adding that the ICA's opinion in *PASH I* places an undue burden on the CZMA process. In any event, the HPC contends that it did not disregard protection of gathering rights because the SMA permit contains a condition requiring establishment of a program for preserving and maintaining the anchialline ponds on the development site. Nansay and the HPC also contend that PASH failed to establish a prima facie claim of native Hawaiian gathering rights – specifically, Nansay claims that the evidence only shows shrimp gathering at the ponds as far back as the late 1920's.

A. *Obligations Under the CZMA*

Within the scope of their authority, "all agencies" in Hawai'i must ensure that their rules comply with the objectives and policies of the CZMA. HRS §§ 205A-4(b) and -5. Moreover, the neighbor island county planning commissions and the Honolulu City Council are specifically required to give "full consideration . . . to . . . *cultural* . . . [and] *historic* . . . *values* as well as to needs for economic development" when implementing the

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the Kona Hawaiian Civic Club, Ka Lahui Hawai'i, the Land Use Research Foundation, Pele Defense Fund, the Office of Hawaiian Affairs, the State of Hawai'i, the 'Ohana Council, and (collectively) Protect Kohanaiki 'Ohana, Inc., the Kalamaula Homestead Association, and the Native Hawaiian Environmental Defense Fund.

objectives, policies, and SMA guidelines set forth in the CZMA. HRS § 205A-4(a) (emphasis added).

In accordance with statutory mandates, HPC Rule 9-11(C) provides that the relevant governmental authority may grant a SMA use permit only upon finding that the proposed development: (1) "will not have any significant adverse environmental or ecological effect";[17] (2) "is consistent with [CZMA] objectives and policies . . . and the [SMA] guidelines";[18] and (3) "is consistent with the General Plan, Zoning Code and other applicable ordinances." A "significant adverse effect," for the purposes of deliberations upon a SMA permit application,[19]

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[17] Limited exceptions to the "[no] significant adverse effect" requirement are available where such impact is minimized to the extent practicable, or is clearly outweighed by public health, safety, or compelling public interest. HPC Rule 9-11(C).

[18] The SMA guidelines are contained in HPC Rule 9-7, which essentially tracks HRS §§ 205A-26(1) and (2). HPC Rule 9-7(A) directs certain minimizing efforts where reasonable. HPC Rule 9-7(B) substantially parallels HPC Rule 9-11(C), differing by the addition of a provision that includes the cumulative impact of *separate development proposals* as potentially significant adverse effects.

[19] The definition of a "significant adverse effect[,]" *see* citations to HPC Rule 9-10(H), *infra* this section, appears in the context of the HPC's threshold determination of qualification for a SMA minor permit versus a SMA use permit. The Director may issue a SMA minor permit only after the following events take place: (1) the Director determines that a proposed project (a) will not have a significant adverse effect and (b) does not exceed $125,000.00 in valuation; and (2) the Chief Engineer reviews the proposed project and makes a recommendation. HPC Rule 9-10(E).

includes the expected primary or secondary consequences of a proposed development, as well as the short- and long-term effects or cumulative consequences of the proposal.

Accordingly, the HPC may not issue a SMA use permit unless it finds that the proposed project will not have any significant adverse effects. *Cf. Hui Alaloa v. Planning Comm'n*, 68 Haw. 135, 705 P.2d 1042 (1985). In *Hui Alaloa*, the Maui Planning Commission (MPC) failed to make the requisite finding that a proposed development on the island of Moloka'i was consistent with CZMA historic protection and preservation objectives. Notwithstanding the inclusion of permit conditions requiring the developer to retain a qualified archaeologist and to substantially comply with the CZMA and HAPA, we vacated the MPC's orders granting SMA permits.

The following factors, inter alia, may constitute significant adverse effects: (a) "an irrevocable commitment to loss or destruction of any natural or *cultural resource, including but not limited to, historic sites* and view planes"; (b) effects upon "the *economic or social welfare and activities of the community,* County or State"; and (c) actions "contrary to the objectives and policies of [the CZMA] and the [SMA] Guidelines[.]" HPC Rule 9-10(H)(1), (4) & (10) (emphases added). *See also* HPC Rule 9-6(A)(2); HRS § 205A-2(b)(2) (one of the CZMA's objectives and policies is to protect and preserve "those natural and manmade historic and prehistoric resources in the coastal zone management area that are *significant in Hawaiian . . . history and culture*") (emphasis added). The interests asserted by PASH fall within these broad categories; therefore, they are entitled to protection under the

CZMA.[20] *See* HRS § 205A-21 (finding that "special controls on development are necessary to avoid permanent losses of valuable resources and the foreclosure of management options, and to ensure . . . adequate access"); HPC Rule 9-11(C) (authorizing the the [sic] HPC to attach "reasonable terms and conditions" to SMA permits); *cf. Hammond v. North Slope Borough*, 645 P.2d 750, 761-62 (Alaska 1982) (holding that Alaska's version of the CZMA requires its agencies to "assure opportunities for subsistence usage of coastal areas and resources" and to issue development permits only where consistent with Alaska's environmental and cultural interests).

In order for any conditions placed on a SMA permit issued by the HPC on remand to be deemed "reasonable," they must bear an essential nexus to legitimate State interests and must be "roughly proportional" to the impact of the proposed development. *See infra* section V.B. (discussing the respective requirements from *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 836, 107 S.Ct. 3141, 3148, 97 L.Ed.2d 677 (1987), and *Dolan v. City of Tigard*, ___ U.S. ___, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994)). Here, the relevant State interests are reflected in

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[20] The State, as amicus curiae, asserts title to the anchialline [sic] ponds as "public trust" lands by virtue of the fact that they are affected by the tides. Although we do not decide this issue, we recognize that the CZMA clearly requires protection and preservation of public "coastal" areas. *See* 16 U.S.C. § 1454(b)(7) (1985) (requiring each state to create a planning process that provides adequate protection of such resources before federal approval is granted and funding will be made available); 16 U.S.C. § 1455(d)(2)(G) (Supp.1993) (requiring a Secretarial finding to that effect).

article XII, section 7 of the Hawai'i Constitution (1978) and HRS § 1-1. *See infra* section IV.B. In other words, the HPC may require dedications appropriately tailored to the special and quantifiable burdens associated with granting discretionary benefits to Nansay, through a SMA permit, which facilitate development of the company's land. Conditions that ensure continued access to the subject property for the legitimate and reasonable practice of customary and traditional rights would presumably comply with constitutional prohibitions against the uncompensated taking of private property. *See infra* section V.B.

B. *Obligations Under Article XII, Section 7 of the Hawai'i Constitution and HRS § 1-1*

In addition to the requirements of the CZMA, the HPC is obligated to protect customary and traditional rights to the extent feasible under the Hawai'i Constitution and relevant statutes. Article XII, section 7 of the Hawai'i Constitution (1978) provides:

> The State reaffirms and *shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes* and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, *subject to the right of the State to regulate such rights.*

(Emphases added.) HRS § 1-1 (Supp.1992) provides:

> The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of [Hawai'i] in all cases, except as otherwise expressly provided by the Constitution or laws of the United States,

> or by the laws of the State, or fixed by Hawaiian judicial precedent, *or established by Hawaiian usage;* provided that no person shall be subject to criminal proceedings except as provided by the written laws of the United States or of the State.

(Emphasis added.)[21]

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[21] *See also Laws of Her Majesty Liliuokalani, Queen of the Hawaiian Islands* 91 (1892) [hereafter L. 1892], ch. LVII, § 5 (providing for exceptions to the English common law where "established by Hawaiian *national* usage") (emphasis added). Although references to the provisions contained in HRS § 1-1 generally focus on the 1892 statute as its predecessor, an examination of historical developments suggests that the principles codified in this statute have much earlier origins. One of the initial attempts to codify the laws of Hawai'i indicated that "[t]he Hawaiian kingdom was *governed until the year 1838, without other system than usage,* and with a few trifling exceptions, without legal enactments." 1 *Statute Laws of His Majesty Kamehameha III, King of the Hawaiian Islands* 3 (1845-46) [hereafter L. 1845-46] (emphasis added). As the kingdom developed further, written laws were promulgated to secure civil liberties and to codify the constitutional monarchy that emerged. *See infra* section IV.B.4 (discussing the development of private property rights in Hawai'i). For example, the first two Acts of Kamehameha III established the Executive Department, including five Ministers and a Privy Council. These initial acts of Kamehameha III dramatically restructured Hawaiian society, but also retained many cultural elements deemed crucial to the survival of the nation's native people. *See infra* note 33 (noting that part of the second Act preserved "native usages in regard to landed tenures"); *see also infra* note 24 (indicating that the titles issued for particular parcels of property typically contained provisions expressly reserving "tenant" rights).

The third Act of Kamehameha III created an independent Judiciary. Act of September 7, 1847, ch. I, § IV; 2 *Statute Laws of His Majesty Kamehameha III, King of the Hawaiian Islands* (1847)

The aforementioned provisions were discussed by this court, in the context of an individual's asserted gathering rights, in *Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 656 P.2d 745 (1982). Ten years later, in *Pele Defense Fund v. Paty, supra*, we recognized that ancient Hawaiian gathering rights may have extended beyond the boundaries of individual ahupua'a in certain cases. 73 Haw. at 620, 837 P.2d at 1272. Nevertheless, neither *Kalipi* nor *Pele* precluded further inquiry concerning the extent that traditional practices have endured under the laws of this State. "In *Kalipi*, we foresaw that '[t]he precise nature and scope of the rights retained by § 1-1 would, of course, depend upon the particular circumstances of each case.' " *Pele*, 73 Haw. at 619, 837 P.2d at 1271 (quoting *Kalipi*, 66 Haw. at 12, 656 P.2d at 752).

[hereafter L. 1847]. The Judiciary was given the authority to cite and adopt "[t]he reasonings and analysis of the common law, and of the civil law [of other countries] . . . so far as they are deemed to be founded in justice, and *not in conflict with the laws and usages of this kingdom.*" L. 1847, at 5 (emphasis added). Shortly thereafter, on September 27, 1847, the House of Nobles and Representatives passed a resolution calling for the preparation of a civil code. As eventually codified, chapter III, § 14 of the Code provided: "[t]he Judges . . . are *bound* to proceed and decide according to equity. . . . To decide equitably, *an appeal is to be made . . . to received usage*, and resort may also be had to the laws and usages of other countries." The Civil Code of the Hawaiian Islands ch. III, § 14, at 7 (1859) [hereafter 1859 Civil Code] (emphases added). *See also id.* at 195 (prohibiting "conflict with the laws and *customs* of this kingdom" in § 823) (emphasis added). Finally, §§ 14 and 823 of the 1859 Civil Code were expressly repealed in "An Act to Reorganize the Judiciary Department," the very same legislation that codified the provision now referred to as HRS § 1-1. *See* L. 1892, at 123-24.

In order to determine whether the HPC must protect traditional and customary rights of the nature asserted in this case, we shall first review our analysis of gathering rights in *Kalipi* and *Pele*. Then we shall clarify the status of customary rights in general, as a result of relevant judicial and legislative developments in Hawaiian history. Finally, we will provide the HPC with some specific, although not necessarily exhaustive, guidelines to aid its future deliberations in the event that Nansay elects to pursue its challenges to the legitimacy of PASH's claims.

1. *Kalipi v. Hawaiian Trust Co.: judicial recognition of traditional Hawaiian gathering rights based upon residency in a particular ahupua'a*

Kalipi involved an individual's attempt to gain access to private property on the island of Moloka'i in order to exercise purportedly traditional Hawaiian gathering rights. The court prefaced its consideration of Kalipi's claims with a discussion of the State's obligation to preserve and enforce traditional Hawaiian gathering rights under article XII, section 7 of the Hawai'i Constitution:

> We recognize that permitting access to private property for the purpose of gathering natural products may indeed conflict with the exclusivity traditionally associated with fee simple ownership of land. But *any argument for the extinguishing of traditional rights based simply upon the possible inconsistency of purported native rights with our modern system of land tenure must fail.*

66 Haw. at 4, 656 P.2d at 748 (emphasis added).

The court then began its analysis of Kalipi's asserted gathering rights by interpreting HRS § 7-1 (1985)[22] so as to essentially "*conform* these traditional rights born of a culture which knew little of the rigid exclusivity associated with the private ownership of land, with a modern

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[22] HRS § 7-1, which has not undergone significant change since the 1851 enactment that amended an earlier version of the statute, provides:

> **Building materials, water, etc.; landlords' title subject to tenants' use.** Where the *landlords* have obtained, or may hereafter obtain, allodial titles to their lands, *the people on each of their lands* shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided that this shall not be applicable to wells and watercourses, which individuals have made for their own use.

(Emphases added.) *See* Act of July 11, 1851, *reprinted in Laws of His Majesty Kamehameha III, King of the Hawaiian Islands* 98-99 (1851) [hereafter L. 1851]. The 1851 enactment deleted provisions established the previous year, which required that persons wishing to exercise such rights must obtain the "landlord['s] . . . consent." *See* Act of August 6, 1850, § 7, *reprinted in Laws of His Majesty Kamehameha III, King of the Hawaiian Islands* 202, 203-04 (1850) [hereafter L. 1850]; *see also infra* section IV.B.4 (discussing both the 1850 enactment and its apparent predecessor, quoted *infra* note 34, which was enacted in 1846).

The term "landlord" appears to be a loose translation of "konohiki" from the Hawaiian language versions of these acts. The word "konohiki" is defined as "[h]eadman of an *ahupua'a* land division under the chief." Pukui & Elbert, *Hawaiian Dictionary* 166 (2nd ed.1986).

system of land tenure in which the right to exclude is perceived to be an integral part of fee simple title." *Id.* at 7, 656 P.2d at 749 (emphasis added). Accordingly, the court fashioned a rule permitting "lawful occupants of an [ahupua'a] . . . [to] enter undeveloped lands within the [ahupua'a] to gather those items enumerated in the statute [HRS § 7-1]." *Id.* at 7-8, 656 P.2d at 749.

> The requirement that these rights be exercised on undeveloped land is not, of course, found within the statute. However, if this limitation were not imposed, there would be nothing to prevent residents from going anywhere within the [ahupua'a], including fully developed property, to gather the enumerated items.[23] *In the context of our current culture this result would so conflict with understandings of property, and potentially lead to such disruption, that we could not consider it anything short of absurd and therefore other than that which was intended by the statute's framers. Moreover, it would conflict with our understanding of the traditional Hawaiian way of life in which cooperation and non-interference with the well-being of other residents were integral parts of the culture.*

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[23] On the contrary, however, "[a]ll the witnesses who testified regarding traditional custom testified that the custom requires that anyone seeking access to the ahupua'a may only exercise those rights in the *uninhabited portions* of the ahupua'a where that person is a tenant, *always respecting the private areas* of other tenants." Kalipi's Reply Brief (No. 6957) at 11 (emphases added). Furthermore, as Kalipi understood his asserted gathering rights, "custom require[d] that *anything planted and cared for by people should be left alone.*" Kalipi's Opening Brief (No. 6957) at 49 (emphasis added).

> Similarly the requirement that the rights be utilized to practice native customs represents, we believe, a reasonable interpretation of the Act as applied to our current context. The gathering rights of § 7-1 were necessary to insure the survival of those who, in 1851, sought to live in accordance with the ancient ways. They thus remain, to the extent provided in the statute, available to those who wish to continue those ways.

Id. at 8-9, 656 P.2d at 749-50 (citation omitted) (footnote and emphasis added).

Because Kalipi did not actually reside within the subject ahupua'a, the court held that he was not entitled to exercise HRS § 7-1 gathering rights there. *Id.* at 9, 656 P.2d at 750. Nevertheless, the court specifically refused to decide the ultimate scope of traditional gathering rights under HRS § 1-1 because there was "an *insufficient basis* to find that such rights would, or should, accrue to persons who did not actually reside within the [ahupua'a] in which such rights are claimed." *Id.* at 12, 656 P.2d at 752 (emphasis added). In other words, *Kalipi* did not foreclose the possibility of establishing, in future cases, traditional Hawaiian gathering and access rights in one ahupua'a that have been customarily held by residents of another ahupua'a.

2. *Pele Defense Fund v. Paty: judicial recognition of traditional access and gathering rights based upon custom*

Pele involved, inter alia, the assertion of customarily and traditionally exercised subsistence, cultural, and

religious practices in the Wao Kele 'O Puna Natural Area Reserve on the Big Island. For the purposes of summary judgment, we held that there was a sufficient basis to find that gathering rights can be claimed by persons who do not reside in the particular ahupua'a where they seek to exercise those rights. *Pele*, 73 Haw. at 621, 837 P.2d at 1272 (reversing summary judgment and remanding for trial on this issue). We specifically held that "native Hawaiian rights protected by article XII, § 7 may extend beyond the ahupua'a in which a native Hawaiian resides." *Pele*, 73 Haw. at 620, 837 P.2d at 1272. In so holding, we explicated the discussion of gathering rights in *Kalipi* by recognizing that a claim based on practiced customs raises different issues than assertions premised on mere land ownership.

> Unlike Kalipi, [Pele Defense Fund] members assert native Hawaiian rights based on the traditional access and gathering patterns of native Hawaiians in the Puna region. Because Kalipi based his claims entirely on land ownership, rather than on the practiced customs of Hawaiians on [Moloka'i], the issue facing us is somewhat different from the issue in *Kalipi*.

Pele, 73 Haw. at 618-19, 837 P.2d at 1271.

Although we later mentioned "other requirements of *Kalipi*" with approval – implicitly referring to the "undeveloped lands" and "no actual harm" requirements of *Kalipi*, see 73 Haw. at 621, 837 P.2d at 1272 – our holding in *Pele* was not intended to foreclose argument regarding those requirements in future, unrelated cases involving assertions of customary and traditional rights under HRS § 1-1. "In Kalipi, we foresaw that '[t]he precise nature and scope of the rights retained by § 1-1 would, of course,

depend upon the particular circumstances of each case.' " *Pele*, 73 Haw. at 619, 837 P.2d at 1271 (quoting *Kalipi*, 66 Haw. at 12, 656 P.2d at 752).

3. The *"other requirements of Kalipi"*

In addition to creating the "undeveloped land" requirement, see *Kalipi*, 66 Haw. at 7-8, 656 P.2d at 749, the court in *Kalipi* made the following observations concerning claims of traditional gathering rights under HRS § 1-1:[24]

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[24] The court in *Kalipi* also addressed the "kuleana" reservation in the title to the lands in question. The "kuleana" reservation provides, " 'Koe nae no kuleana a na kanaka moloko,' [which was] translated at trial to mean 'the kuleanas [sic] of the people therein are excepted' . . . [, and which thereby states the government's intention to] ' . . . hereby declare these lands to be set apart as the lands of the Hawaiian Government, *subject always to the rights of tenants.*' " *Kalipi*, 66 Haw. at 12, 656 P.2d at 752 (emphasis added). Although the court withheld comment on the precise scope of this alternative source of gathering rights, *see Kalipi*, 66 Haw. at 12-13, 656 P.2d at 752, it nevertheless indicated that *Territory v. Liliuokalani*, 14 Haw. 88, 95 (1902) (holding that a similar reservation did not incorporate any public right to the use of certain shoreline areas included within a grant of land), does not necessarily dispose of the "kuleana" reservation as a source of additional gathering rights beyond HRS § 7-1. *Id.* at 12, 656 P.2d at 752.

> The word "kuleana" is defined as, inter alia, "[r]ight, privilege, concern, responsibility, . . . [or] small piece of property, as within an *ahupua'a* [.]" Pukui & Elbert, *Hawaiian Dictionary* 179 (2nd ed. 1986). The word "kanaka" is defined, inter alia, as "person, individual, . . . subject, as of a chief; laborer, . . . Hawaiian[.]" *Id.* at 127.

We perceive the Hawaiian usage exception to the adoption of the common law to represent an attempt on the part of the framers of the statute to avoid results inappropriate to the isles' inhabitants by permitting the continuance of native understandings and practices which did not unreasonably interfere with the spirit of the common law. The statutory exception is thus *akin to the English doctrine of custom* whereby practices and privileges unique to particular districts continued to apply to the residents of those districts even though in contravention of the common law. *This is not to say that we find that all the requisite elements of the doctrine of custom were necessarily incorporated in § 1-1. Rather we believe that the retention of a Hawaiian tradition should in each case be determined by balancing the respective interests and harm once it is established that the application of the custom has continued in a particular area.*

In this case, Plaintiff's witnesses testified at trial that there have continued in certain [ahupua'a] a range of practices associated with the ancient way of life which required the utilization of the undeveloped property of others and which were not found in § 7-1.[25] Where these practices have, without harm to anyone, been continued, we are of the opinion that the reference to Hawaiian usage in § 1-1 insures their continuance for so long as no actual harm is done thereby.

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[25] These included the gathering of items not delineated in § 7-1 and the use of defendants' lands for spiritual and other purposes. *Id.* at 10 n. 4, 656 P.2d at 751 n. 4.

> *Oni v. Meek*, [2 Haw. 87, (1858)], does not preclude this conclusion, for in that case the application of the doctrine of custom was argued and the doctrine itself was not rejected- . . . . Moreover, the language in *Oni* respecting the conclusiveness of § 7-1 does not necessarily preclude application of the doctrine.

Id. at 10-11, 656 P.2d at 751 (citations omitted) (footnote renumbered and internal citation added) (emphases added).[26] In reaching its conclusion regarding the continued existence of customary rights, the *Kalipi* court

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[26] The elements of the common-law doctrine of custom, as set forth in 1 W. Blackstone, Commentaries 76-78 (Sharwood ed. 1874) [hereafter Blackstone's Commentaries] are that the alleged custom must be, or have been:

(1) exercised so long "that the memory of man runneth not to the contrary" – according to subsequent commentators, "long and general" usage is sufficient, *see, e.g., State ex rel. Thornton v. Hay*, 254 Or. 584, 596, 462 P.2d 671, 677 (Or.1969) (citing Professor Cooley's edition of the Commentaries);

(2) without interruption (as to the *right* versus *exercise* thereof – i.e., continuous exercise is not required: "the custom is not destroyed, though they do not use it for ten years; it only becomes more difficult to prove");

(3) peaceable and free from dispute (i.e., exercised by consent);

(4) reasonable – i.e., "of artificial and legal reason, warranted by authority of law" and appropriate to the land and the usages of the community;

(5) certain;

(6) obligatory or compulsory (when established); and

(7) consistent with other customs.

necessarily rejected the appellee's contentions that 1) "any customary rights which might otherwise have been retained by § 1-1 have been abrogated by judicial precedent[,]" and 2) "no customary rights other than those found in . . . [HRS § 7-1] survived the [*Mahele*]."[27] *Id.* at 9-10, 656 P.2d at 750. *Oni* does not stand for the proposition that customary rights, which had not yet been formally established through judicial proceedings,

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[27] *Kalipi* implicitly rejected the Hawaiian Trust Company's argument, which was based on language in *Oni* to the effect that the rights provided by the Act of August 6, 1850, were declarative of *"all* the specific rights of the [*hoa'aina*] (except fishing rights) which should be held to prevail against the fee simple title of the konohiki[.]" 2 Haw. at 95.

The English version of the 1850 Act uses the term "people," which was held to be synonymous with the word "hoa'aina." *Id.* at 96. The word "hoa'aina" is defined as "[t]enant, caretaker, as on a *kuleana."* Pukui & Elbert, *Hawaiian Dictionary* 73 (2nd ed. 1986). Meanwhile, the term "tenant" includes "one who holds or possesses real estate or sometimes personal property . . . by *any kind* of right[.]" *Webster's Third New Int'l Dictionary* 2354 (1967 ed.) (emphasis added). Therefore, it is possible to construe the term "tenant" so as to incorporate the traditional native Hawaiian concept of a cultural link to the land. *See McBryde Sugar Co. v. Robinson* [*McBryde* II], 55 Haw. 260, 289 n. 29, 517 P.2d 26, 42 n. 29 (1973) *cert. denied,* 417 U.S. 976, 94 S.Ct. 3183, 41 L.Ed.2d 1146 (1974) (Levinson, J., dissenting) (suggesting the need for comparative analysis of bilingual statutes because the English version is binding under HRS § 1-13 only when there is a "radical or irreconcilable difference" between the two versions); *In re Ross,* 8 Haw. 478, 480 (1892) ("[t]he effort is always made to have [the two versions] exactly coincide, and the legal presumption is that they do"). *See also infra* note 35 (discussing the definition of "maka'ainana"). Nevertheless, we recognize that the Hawaiian language version of this Act actually uses the word "kanaka." *See supra* note 24.

were extinguished *sub silentio* by the *Mahele* or its associated legal developments. *Oni* merely rejected one particular claim based upon an apparently non-traditional practice that had not achieved customary status in the area where the right was asserted.

The *Kalipi* court implicitly acknowledged the possibility of recognizing certain customary rights, under HRS § 1-1, to gather items that are not specifically delineated in HRS § 7-1. *See supra* note 26 & accompanying text (quoting *Kalipi*, 66 Haw. at 10 & n. 4, 656 P.2d at 751 & n. 4). However, the court did not fully embrace the opportunity to clarify *Oni* with respect to the potential application of the doctrine of custom.[28] We believe that the *Kalipi*

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[28] Immediately prior to its substantive analysis, the court in *Kalipi* summarily stated:

> Kalipi asserts that it has *long been the practice* of him and his family to travel the lands of the Defendants in order *to gather indigenous agricultural products for use in accordance with traditional Hawaiian practices*. . . .
>
> A trial was had and *the jury, by special verdict, determined that Kalipi had no such right*. He now alleges numerous errors in the trial court's instructions to the jury and conduct of the trial. We find, for the reasons stated below, that none of the alleged errors warrants reversal.

Kalipi, 66 Haw. at 3-4, 656 P.2d at 747 (emphases added). Nevertheless, the undisputed facts of the case reveal that the jury asked the trial court, "May we please have the book with the 1892 reference to rights in question . . . [i.e., Special Verdict Interrogatory Number 8]?" The trial court responded by instructing the jury to *disregard* Special Verdict Interrogatory Number 8, which read: "Did Hawaiian custom and usage as of 1892 include the right of a tenant of land in an [ahupua'a] to gather native products from his [ahupua'a]?" *See* Kalipi's

court's preoccupation with residency requirements under HRS § 7-1 obfuscated its cursory examination of Kalipi's alternative claim based on customarily and traditionally exercised Hawaiian rights.[29] Accordingly, we read the

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Opening Brief (No. 6957) at 14, 53-57; Hawaiian Trust's Answering Brief (No. 6957) at 52-54.

Although Jury Instruction No. 21 already contained the 1892 reference (i.e., the text of HRS § 1-1), it is difficult to reconcile the trial court's response, or the appellate court's conclusion that there was no reversible error, with the implicit rejection of related Jury Instruction No. 19 in *Kalipi*. *See supra* note 27 & accompanying text (rejecting an argument based on parallel language from *Oni*). Jury Instruction No. 19 read:

> If you find that prior customs, usages and practices with respect to rights of kuleana owners *have been superseded or abrogated by the enactment of [HRS] § 7-1* or its predecessor statutes, then you may find that the specific rights which are enumerated in [HRS] § 7-1 are *all of the rights* . . . which Plaintiff may be entitled to exercise.

Kalipi's Opening Brief (No. 6957) at 54 (emphasis added); Hawaiian Trust's Answering Brief (No. 6957) at 10 (emphasis added).

[29] Kalipi focused on his status as a landowner merely as an attempt to show that he belonged to the class of persons intended to benefit under HRS § 7-1. *See* Kalipi's Opening Brief (No. 6957) at 28 (citing *McBryde Sugar Co. v. Robinson*, 54 Haw. 174, 192, 504 P.2d 1330, 1341 (defining "people" in HRS § 7-1 parenthetically as "meaning owners of land"), *aff'd upon rehearing*, 55 Haw. 260, 517 P.2d 26 (1973), *appeal dismissed* and *cert. denied*, 417 U.S. 962, 94 S.Ct. 3164, 41 L.Ed.2d 1135 *cert. denied*, 417 U.S. 976, 94 S.Ct. 3183, 41 L.Ed.2d 1146 (1974)). In other words, Kalipi claimed that the statute preserved access and gathering rights as an incident of ownership, so long as these rights were utilized for valid purposes associated with that particular site. *Cf. Damon v. Tsutsui*, 31 Haw. 678, 687 (1930); *Smith v. Laamea*, 29 Haw. 750, 755-56 (1927); *Haalelea v.*

discussion of customary rights in *Oni* and *Kalipi* as merely informing us that the balance of interests and harms clearly favors a right of exclusion for private property owners as against persons pursuing *non-traditional* practices or exercising otherwise valid customary rights in an *unreasonable* manner.

On the other hand, the *reasonable* exercise of ancient Hawaiian usage is entitled to protection under article XII, section 7. *See Pele*, 73 Haw. at 618-21, 837 P.2d at 1269-72 (holding that rights primarily associated with residence in a particular ahupua'a under HRS § 7-1 might have extended beyond those bounds through ancient Hawaiian custom preserved in HRS § 1-1); *id.* at 620, 837 P.2d at 1272 (holding that article XII, section 7 reaffirmed *"all* such rights"). Traditional and customary rights are properly examined against the law of property as it has developed in this state. Thus, the regulatory power provided in article XII, section 7 does not justify summary extinguishment of such rights by the State merely because they are deemed inconsistent with generally understood elements of the western doctrine of "property."

Montgomery, 2 Haw. 62, 71 (1858) (interpreting the term "tenant" so as to pass the common right of piscary to the grantee, through sale or other conveyance, as an appurtenance to the land). The claim in *Oni* involved a purported right of pasturage arising primarily from the claimant's status as a landowner. 2 Haw. at 90. To the extent that Oni's claims might have otherwise been based on ancient tenure, he abandoned these claims by entering into a special contract to provide labor for the konohiki in exchange for the right to pasture his horses. *Id.* at 91.

4. *The development of private property rights in Hawai'i*

Some of the generally understood western concepts of property rights were discussed in *Reppun v. Board of Water Supply*, 65 Haw. 531, 656 P.2d 57 (1982).

> The western doctrine of "property" has traditionally implied certain rights. Among these are the right to the use of the property, the right to exclude others[,] and the right to transfer the property with the consent of the "owner". In conformance with creation of private interests in land, each of these rights were embodied in the delineation of post-[Mahele] judicial water rights. Ostensibly, this judge-made system of rights was an outgrowth of Hawaiian custom in dealing with water. However, the creation of private and exclusive interests in water, within a context of western concepts of property, compelled the drawing of fixed lines of authority and interests which were not consonant with Hawaiian custom.

Id. at 547, 656 P.2d at 68. Although the court in *Reppun* focused on interests in water, its discussion of the development of Hawaiian property rights is enlightening.

> In 1840 the first constitution of the Kingdom of [Hawai'i] proclaimed that although all property belonged to the crown "it was not his private property. It belonged to the Chiefs and the people in common, of whom [the King] was the head, and had the management of the landed property." [Hawai'i] Const. of 1840 in *Fundamental Laws of Hawaii* 3 (1904). Thus, prior to the [Mahele], all land remained in the public domain. However, other laws passed during the

> same period lay the foundation for the eventual imposition of private property rights in land by limiting the King's and landlords' heretofore unregulated authority to disseize one to whom land had been granted and insuring certain rights of the common people and lesser lords.

Id. at 542, 656 P.2d at 65.

The 1839 Declaration of Rights, which was incorporated into the 1840 Constitution, provided that "nothing whatever shall be taken from any individual except by express provision of the laws." Thurston, *Fundamental Law of Hawaii* 1 (emphasis added) [hereafter *Fundamental Law*]. *See also Kekiekie v. Dennis*, 1 Haw. 42, 43 (1851) (recognizing that the rights of each hoa'aina, or ahupua'a tenant, were secured by the 1840 constitution). Several laws enacted in 1839 and 1840, and later compiled in the Laws of 1842, permitted the extinguishment of tenant rights in limited circumstances. *See, e.g.*, Act of Nov. 9, 1840, ch. III, § 7, *reprinted in Fundamental Law* at 20 (excepting from restoration to previous holders those residuum lands that were separated from their affiliated lands for reasons of public interest); *Fundamental Law* at 43 (providing compensation for incursions related to road-building); *id.* at 133-35 (permitting dispossession of tenants because of idleness, where such idleness is proven at trial).

The 1840 constitution reflected an attempt to deal with chiefs and foreigners who sought to vest land rights without the required consent of the King. *See* Kuykendall, *The Hawaiian Kingdom 1778-1854* (1938) [hereafter

Kuykendall].[30] Gun-boats frequently came to Hawai'i to enforce the claims of foreigners. Levy, "Native Hawaiian Land Rights," 63 Cal.L.Rev. 848, 852 (1975) [hereafter Levy]; Kuykendall at 153. For example, British Consul Richard Charlton claimed a valuable piece of land based upon a 299-year lease supposedly obtained from a Hawaiian named Kalanimoku in 1826. Kuykendall at 208.

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[30] Before 1820 the foreigners who became residents of Hawai'i and who acquired land were predominantly of a humble status, commonly sailors. They conformed, in matters of property, to the customs of the country. After 1820 conditions changed. . . . *Foreigners began to deal with their property as they would have done in their home countries; in doing so they sometimes violated Hawaiian customs.* On the other hand, the native authorities treated the property of foreigners as they did that of their own subjects, thus creating much dissatisfaction. . . . [A]fter 1830 there were many cases arising out of alleged violations of the land and property rights of foreigners. *Foreigners began to deny the right of the government to arbitrarily dispossess them of land or to prevent the transfer of property from one foreigner to another, and they appealed to their own governments for protection – successfully in some instances.*
Kuykendall at 137-38 (emphases added).

"Westerners entered . . . land usage patterns [in Hawai'i when certain] . . . foreign settlers were 'given' lands by the [K]ing or chiefs in return for services or merely out of traditional Hawaiian generosity." Levy, "Native Hawaiian Land Rights," 63 Cal.L.Rev. 848, 850 (1975). *See Keelikolani v. Robinson*, 2 Haw. 514 (1862) (describing an 1827 agreement involving the grant of rights in a Honolulu wharf, which were provided in exchange for payment of half the expenses of maintaining the wharf and half of any proceeds collected therefrom). However, foreigners who received land in Hawai'i "held it by the same precarious tenure as native subjects, simply at the pleasure of the [K]ing." Kuykendall at 73; *see also 1 Privy Council Records* 149 (1845-46) ("we indeed did wish to give Foreigners lands . . . but *to the natives they are revertable*") (emphasis added).

Kalanimoku was a husband of the dowager Queen Ka'ahumanu and also served as a guardian of the young King Kamehameha III. The lease purportedly covered land occupied by Charlton as well as an adjoining piece, which had been occupied since 1826 by the retainers of Queen Ka'ahumanu. *Id.* at 208-09. Kamehameha III rejected this claim in 1840 for various reasons, including absence of legitimate authority to make the grant. *Id.* at 209. Conflicts exacerbated by further adverse decisions of the King and the Hawaiian courts, *see id.* at 208-12, eventually led to the provisional cession of Hawai'i on February 25, 1843, under threat of violence, to Lord George Paulet, commander of the British warship *Carysfort.*[31] *Id.* at 216; Levy at 852. Although Hawaiian independence was reaffirmed on July 31, 1843, these events would have a profound impact on future socio-political developments in the islands.

The minutes of a Privy Council meeting on October 9, 1845 reveal the continuing belief that "nothing but difficulties, even though we should be without fault, would result from the system of Reports of Foreign Consuls, being supported, and their complaints redressed without inquiry, by the Naval Forces of their nations." 1 *Privy Council Records* at 89, 91. Later, during the kingdom's

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[31] Many of the King's advisors urged him to let them fire upon the invading forces, "but the usual pacific course prevailed." Kuykendall, at 214. After Rear Admiral Richard Thomas rejected the provisional cession and reconfirmed Hawaiian sovereignty, "[t]he King is said to have made use of the expression which became the motto of [Hawai'i], *Ua mau ke ea o ka aina i ka pono* ('The life of the land is preserved in righteousness')." *Id.* at 220 n. 47.

ongoing efforts to resolve Charlton's land claim, additional claims surfaced. The minutes of another Privy Council meeting indicate:

> The King remarked, . . . give up this new claim, and then the General will claim the whole harbour. They all agreed that in some way or other, not disrespectful to the British Government, an end must be put to these pretensions coming upon them unexpectedly, *contrary to all the law and usage among them.*

Id. at 147 (emphasis added).

Consequently, the development of private property rights was deemed "indispensable" to the "political existence" of the kingdom. L. 1845-46, at 5. Furthermore, the "increase of foreign commerce and the enhanced value of property . . . required something more of the Hawaiian courts than mere investigation of facts." *Id.* ("The events of the late Provisional Cession to Great Britain conclusively prove that some more minute and extensive judicature was long since requisite."). *See also* 2 *Privy Council Records* 231 (1846-47) (discussing a "compromise for the sake of peace" in another dispute with foreigners). At the time, native Hawaiian subjects frequently petitioned Kamehameha III regarding the dramatic changes taking place in the kingdom. *See, e.g.*, petition signed by 301 residents of Lana'i, dated April 1845, Hawai'i State Archives (HSA), Interior Dept., Miscellaneous File (asking the King not to appoint foreign Ministers, and not to sell any more land to foreigners, because "[w]e are afraid that the wise will step on the ignorant"); *The Friend*, vol.

III, no. XV, August 1, 1845, at 118-19 (reprinting a similar petition, signed by over 1600 people).[32]

The next major step in the evolution of private property rights was the formation in 1845 of the Board of Land Commissioners to quiet land titles. See *Law Creating the Board to Quiet Land Titles,* in Fundamental Laws of Hawaii 137 (1904). It was the Land Commission's responsibility to ascertain or reject claims of interests in land brought before it. Decisions of the Board were to be made in accordance *with the civil law and native customs of the*

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[32] The accompanying reply from the Privy Council, which was approved without dissent by the nation's legislators, reveals the government's rationale: "formerly there were many difficulties, and the land was taken; it was not taken because the government was really in wrong, but because evil was sought. Here is the difficulty which ruins the government, viz: *the complaint of foreign governments followed by the infliction of punishment." The Friend* at 118 (emphasis added). Furthermore, regarding the sale of land to foreigners:

> it is by no means proper to sell land to aliens, nor is it proper to give them land, for the land belongs to Kamehameha III.; there is no chief over him. But we think it is proper to sell land to his Majesty's people, that they may have a home. But if these persons wish to sell their lands again, they cannot sell to aliens, for there is only one sovereign over those who hold the lands; but if the people wish to sell to those who have taken the oath of allegiance, they can do so, for Kamehameha III is over them. . . . There has not been much land sold, but foreigners have heretofore occupied lands through favor, without purchasing. It is better to sell.

Id.

Kingdom.[33] The Board itself was not empowered to grant fee simple title to land. Rather, its duty was to define each applicant's identifiable interests in land and issue an award describing those interests. Actual title to land could be gained only by a payment of commutation to the Kingdom and issuance of a royal patent. See, Chinen, *The Great Mahele: Hawaii's Land Division of 1848* (1958).

To carry out its duties, the Land Commission adopted principles that were to be followed in quieting title to land. The principles were subsequently also adopted by the legislative council of the Kingdom and were made binding rules by which all claims to land would be tested. Laws of 1847, at 81, RLH 1925, Vol. II at 2124. In its statement of principles the Land Commission related the necessity of its establishment to the unenforceability of the laws passed at the time of the Constitution of 1840 noting that:

> Neither the laws of 1839 nor of 1840 were found adequate to protect the inferior lords and tenants, for although the violators of law, of every rank, were liable to its penalty, yet it was so contrary to ancient usage, to execute the law on the powerful for the protection of the weak, that the latter often suffered, and it was found necessary to adopt a new system for ascertaining rights, and new measures for protecting those

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[33] Specifically, the Land Commission was constrained to make its decisions regarding interests in land "in accordance with the principles established by the civil code of this kingdom in regard to . . . occupancy, . . . [and] *native usages in regard to landed tenures* [.]" Act of April 27, 1846, pt. I, ch. VII, art. IV, § 7; L. 1845-46, at 109, *reprinted in 2 Revised Laws of Hawaii* 2123 (1925).

> rights when ascertained, and to accomplish this object the Land Commission was formed.

The Land Commission therefore viewed its responsibilities as including the actualization of the laws of 1839 and 1840, among them, of course, the law[s] governing . . . [residuum lands and dispossession of tenants, *see* selected provisions from the compiled Laws of 1842, *supra* this section].

Thus, when in the next paragraph the Board reserves from allocation to private persons "the sovereign prerogatives" of the King, including the power:

> To encourage and even to enforce the usufruct of lands for the common good[,]

> it is clear that in accordance with pre-existing civil law and native usage, the Commission intended to reserve to the sovereign the right to regulate . . . [undeveloped land] in accord with the needs of the people of the Kingdom.

Reppun, 65 Haw. at 543-44, 656 P.2d at 66 (footnote added) (bracketed material inserted in place of references to interests in water). *See also McBryde*, 54 Haw. at 184-86, 504 P.2d at 1337-38 (indicating that the Mahele proclaimed Kamehameha's intention to "share" the lands with his people, and that confirmation of title was subject to inalienable sovereign prerogatives). Thus, the Land Commission's principles included appropriate provisions intended to preclude the konohiki from "dispos[ing] of the grass land as to leave . . . his hoaainas [sic] destitute" and to preclude the government from selling "unoccupied" or "vacant" land so "as to leave the [hoa'aina]

destitute." L.1847, at 70-72 (citing §§ 2 and 6 of Act of November 7, 1846).[34]

After the Mahele, the Privy Council considered the rights of tenants under the new system of private land ownership and proposed a resolution providing that:

> the rights of the makaainanas [sic] to firewood, timber for house, grass for thatching, ki leaf, water for household purposes in said land, and the privilege of making salt and taking certain fish from the seas adjoining said lands shall be and is hereby sacredly reserved and confirmed to them for their private use [should they need them] but not for sale . . . provided, that before going for firewood, timber for houses and grass

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[34] The Act of November 7, 1846, "Joint Resolutions on the Subject of Rights in Lands and the Leasing, Purchasing and Dividing of the Same," also codified certain gathering rights:

> The rights of the *Hoaaina* [sic] in the land consist of his own taro patches, and all other places which he himself cultivates for his own use; and if he wish to extend his cultivation on unoccupied parts, he has the right to do so. He has, also, rights in the grass land, if there be any under his care, and he may take grass for his own use or for sale, and may also take fuel and timber from the mountains for himself. He may also pasture his horse and cow and other animals on the land, but not in such numbers as to prevent the konohiki from pasturing his. He cannot make agreement with others for the pasturage of their animals without the consent of his konohiki, and the Minister of Interior.

Id., § 1, *reprinted in* 2 *Statute Laws of His Majesty Kamehameha III, King of the Hawaiian Islands* 70 (1847) [hereafter L. 1847] (emphasis in original); *cf.* 3 Kent's Commentaries 404 (12th ed. 1989) (discussing "rights of common").

> for thatching, said makaainanas [sic] shall give notice to the Lord or his luna resident therein.

3B *Privy Council* Records 681, 687 (1850).[35] The King responded, however, by expressing his concern that "a little bit of land even with allodial title, if they were cut off from all other privileges, would be of very little value [.]" *Id.* at 713. Accordingly, the final resolution was passed with the comment that "the proposition of the King, which he inserted as the seventh clause of the law, a rule for the claims of the common people to go to the mountains, and the seas attached to their own particular land exclusively, is agreed to[.]" *Id.* at 763; *see* L. 1850, § 7, at 203-04. Provisions of the law requiring the landlord's consent were repealed the following year because "many difficulties and complaints have arisen from the bad feeling existing on account of the Konohiki's [sic] forbidding the tenants on the lands enjoying the benefits that have been by law given them." L. 1851, at 98.

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[35] The word "maka'ainana" is defined as "[c]ommoner, populace, people in general; citizen, subject . . . people that attend the land." Pukui & Elbert, *Hawaiian Dictionary* 224 (2nd ed. 1986). Our observations concerning the interpretation of "hoa'aina" and "tenant" as incorporating traditional Hawaiian cultural attitudes toward the land, *see supra* note 27, are further supported by this legislative history. *See also* Kent, *Treasury of Hawaiian Words* 386 (1986) (defining "maka'ainana" as, inter alia, the "laboring class, which was resident on the land they worked and transferred with it when ownership changed").

The bracketed phrase "should they need them" was inserted in the subsequent enactment of August 6, 1850, *see* L. 1850, at 202, along with the additional requirement that "[t]hey shall also inform the landlord or his agent, and proceed with his consent." *Id.* However, these phrases were deleted the following year. *See supra* note 22.

Given the preservation of Hawaiian usage in conjunction with the transition to a new system of land tenure, *see, e.g., supra* note 23 (outlining the continued reliance on custom and usage throughout the kingdom's legal history, which was adopted as the law of the territory upon annexation of these islands to the United States); *supra* note 33 (quoting L. 1845-46, at 109),[36] it is doubtful that "accept[ance]" of traditional and customary rights was required or that recognition of such rights would have "fundamentally violat[ed] the new system." *Kalipi*, 66 Haw. at 11 n. 5, 656 P.2d at 751 n. 5.[37] *See supra* section IV.B.3 (indicating that *Kalipi* implicitly rejected the argument that customary rights were extinguished by the specification of tenant rights in the 1846, 1850, and 1851 legislative enactments).

Our examination of the relevant legal developments in Hawaiian history leads us to the conclusion that the western concept of exclusivity is not universally applicable in Hawai'i. *Cf. Stevens v. City of Cannon Beach*, 317 Or. 131, 143, 854 P.2d 449, 456 (1993), *cert. denied*, ___ U.S. ___,

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[36] *See also In re Ashford*, 50 Haw. 314, 440 P.2d 76 (1968) ("[Hawaiian] land laws are unique in that they are based upon ancient tradition, practice and usage.").

[37] In *Kalipi*, the court added the following dictum after enunciating its balancing test for retention of HRS § 1-1 rights: "[t]he relevant inquiry is . . . whether the privileges which were permissibly or contractually exercised persisted to the point where it had evolved into an *accepted* part of the culture and whether these practices had continued without *fundamentally violating the new system.*" *Id.* (emphases added). As indicated in the text above, we disapprove any additional requirements for the establishment of customary rights that might be inferred from this dictum.

114 S.Ct. 1332, 127 L.Ed.2d 679 (1994) (holding that "[w]hen plaintiffs took title to their land, they were on [constructive] notice that exclusive use . . . was not part of the 'bundle of rights' that they acquired"). In other words, the issuance of a Hawaiian land patent confirmed a limited property interest as compared with typical land patents governed by western concepts of property. *Cf. United States v. Winans*, 198 U.S. 371, 384, 25 S.Ct. 662, 665, 49 L.Ed. 1089 (1905) (observing that the United States Congress was competent "to secure to the Indians such a remnant of the great rights they possessed").

Although this premise clearly conflicts with common "understandings of property" and could theoretically lead to disruption, *see Kalipi*, 66 Haw. at 8-9, 656 P.2d at 750, the non-confrontational aspects of traditional Hawaiian culture should minimize potential disturbances. *See, e.g., supra* note 22 and *infra* note 43. In any event, we reiterate that the State retains the ability to reconcile competing interests under article XII, section 7. We stress that unreasonable or non-traditional uses are not permitted under today's ruling. *See, e.g., Winans*, 198 U.S. at 379, 25 S.Ct. at 663, 49 L.Ed. 1089 (noting that the trial court found "that it would 'not be justified in issuing process to compel the defendants to permit the Indians to *make a camping ground of their property while engaged in fishing*' ") (emphasis added).[38]

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[38] The United States Supreme Court has also held that use of the hallucinogenic drug peyote is an unreasonable traditional practice, *see Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), as are attempts by religious practitioners to exclude all other uses, including timber harvesting, from sacred areas of the public lands. *Lyng v. Northwest Cemetery Protective Ass'n.*, 485 U.S. 439, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988).

There should be little difficulty accommodating the customary and traditional Hawaiian rights asserted in the instant case with Nansay's avowed purposes. A community development proposing to integrate cultural education and recreation with tourism and community living represents a promising opportunity to demonstrate the continued viability of Hawaiian land tenure ideals in the modern world.

5. *Customary Rights under Hawai'i law*

The *Kalipi* court properly recognized that "all the requisite elements of the doctrine of custom were [not] necessarily incorporated in § 1-1." 66 Haw. at 10, 656 P.2d at 751.83101883 Accordingly, HRS § 1-1 represents the codification of the doctrine of custom *as it applies in our State*. One of the most dramatic differences in the application of custom in Hawai'i is that passage of HRS § 1-1's predecessor fixed November 25, 1892 as the date Hawaiian usage must have been established in practice. *Compare State v. Zimring* [*Zimring II*], 58 Haw. 106, 115 n. 11, 566 P.2d 725, 732 n. 11 (1977) (*citing State v. Zimring* [*Zimring I*], 52 Haw. 472, 479 P.2d 202 (1970)), *with Oni*, 2 Haw. at 90 (implying that the "time immemorial" standard "is entitled to great weight" but declining to express a conclusive opinion).[39]

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[39] The *Zimring I* court implicitly disapproved the "time immemorial" standard when it indicated that "the Hawaiian usage mentioned in HRS § 1-1 is usage which predated November 25, 1892." 52 Haw. at 475, 479 P.2d at 204. The court in *Oni* also appears to have misconstrued other elements of the doctrine of custom by concluding that the custom urged in that case

Other differences in the doctrine's applicability are readily discernible. For example, under English common law, "a custom for every inhabitant of an ancient messuage [meaning "[d]welling-house with the adjacent buildings and curtilage[,]" *see Black's Legal Dictionary* 990 (6th ed.1990)] within a parish to take a profit *a prendre* in the land of an individual is bad." Blackstone's Commentaries, at 78 n. 18. Strict application of the English common law, therefore, would apparently have precluded the exercise of traditional Hawaiian gathering rights. As such, this element of the doctrine of custom could not apply in Hawai'i. *See supra* note 21 (discussing the prominent status of custom throughout Hawaiian legal history).

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was "so unreasonable, so uncertain, and so repugnant to the spirit of the present laws[.]" 2 Haw. at 90. *See supra* note 26 (listing elements 4, 5, and 7). Contrary to the apparent understanding of the *Oni* court: (1) "consistency" is properly measured against other customs, not the spirit of the present laws; (2) a particular custom is "certain" if it is objectively defined and applied; certainty is not subjectively determined; and (3) "reasonableness" concerns the manner in which an otherwise valid customary right is exercised – in other words, even if an acceptable rationale cannot be assigned, the custom is still recognized as long as there is no "good legal reason" against it. *See* Blackstone's Commentaries at 76-78.

Although the administrative record in this case only contains specific evidence of shrimp gathering as early as the 1920's, the unrefuted testimony by members of PASH sufficiently established their interests in the SMA permit proceeding for our present purposes. *See supra* section III.D. Having effectively curtailed PASH from developing a complete record, Nansay cannot complain about a procedural remand. However, Nansay is not precluded from raising the issue of standing on remand. *See* HRS § 91-9(c).

In light of the confusion surrounding the nature and scope of customary Hawaiian rights under HRS § 1-1, the following subsections of this opinion discuss applicable requirements for establishing such rights *in the instant case.*

a.

Nansay argues that the recognition of rights exercised by persons who do not actually reside in the subject ahupua'a "represents such a departure from existing law . . . [that *Pele*] should be overruled or strictly limited to its specific facts." Nansay's Third Supp. Brief, at 2-3 n. 1. Nansay contends further that *Pele* is inconsistent with the fundamental nature of Hawaiian land tenure, which allegedly recognizes only three classes: government, landlord, and tenant. *Id.* at 3-4; *see* Principles adopted by Land Commission (1847), *reprinted in* 2 Revised Laws of Hawai'i (RLH), at 2124-37 (1925).

We decline Nansay's invitation to overrule *Pele;* on the contrary, we reaffirm it and expressly deem the rules of law posited therein to be applicable here. In *Pele,* we held that article XII, section 7, which, inter alia, obligates the State to protect customary and traditional rights normally associated with tenancy in an ahupua'a, may also apply to the exercise of rights beyond the physical boundaries of that particular ahupua'a. *Pele,* 73 Haw. at 620, 837 P.2d at 1272; *see also Palama v. Sheehan,* 50 Haw. 298, 300-01, 440 P.2d 95, 97 (1968) (noting that Hawaiians did not necessarily reside in the same place that they exercised traditional rights). Although it is not clear that customary rights should be limited by the term "tenant,"

see supra note 27, we are nonetheless aware that the "tenant" class includes at least one sub-class. *See* 2 RLH (1925), at 2124, 2126 (mentioning a "lowest class of tenants," "lower orders" and "sub-tenants," apparently from the Hawaiian terms "lōpā ma lalo," "hoa'āina ma lalo," and "lōpā"). Therefore, we hold that common law rights ordinarily associated with tenancy do not limit customary rights existing under the laws of this state.

b.

In the context of an argument challenging the Pele Defense Fund's (PDF) standing to bring its claim, as raised on appeal in *Pele*, we made passing reference to the circuit court's finding that PDF's membership included persons of "fifty percent or more Hawaiian blood[.]" 73 Haw. at 615 n. 28, 837 P.2d at 1269 n. 28; *see also* 73 Haw. at 620 n. 34, 837 P.2d at 1272 n. 34 (citing affidavits of persons with at least one-half native Hawaiian blood). Because the lower court's relevant factual determination was not challenged on appeal, we did not disturb this finding in *Pele*.

Nevertheless, these references in *Pele* were not intended to imply our endorsement of a fifty percent blood quantum requirement for claims based upon traditional or customary Hawaiian rights. The definition of the term "native Hawaiian" in the Hawaiian Homes Commission Act (HHCA)[40] is not expressly applicable to other

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[40] For the purposes of the HHCA, the term " 'native Hawaiian' means any descendant of not less than one half part of the blood of the races inhabiting the Hawaiian islands previous to

Hawaiian rights or entitlements. Furthermore, the word "native" does not appear in HRS § 1-1. Because a specific proposal to define the terms "Hawaiian" and "native Hawaiian" in the 1978 Constitutional Convention was not validly ratified, the relevant section was deleted from the 1985 version of the HRS. *See Kahalekai v. Doi*, 60 Haw. 324, 342, 590 P.2d 543, 555 (1979). Consequently, those persons who are "*descendants of native Hawaiians* who inhabited the islands prior to 1778," and who assert otherwise valid customary and traditional Hawaiian rights under HRS § 1-1, are entitled to protection regardless of their blood quantum. Haw. Const., art XII, § 7 (emphasis added).[41] Customary and traditional rights in these islands flow from native Hawaiians' pre-existing sovereignty. The rights of their descendants do not derive from their race per se, and were not abolished by their inclusion within

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1778[.]" HHCA, 1920, § 201(a)(7); Act of July 9, 1921, c. 42, 42 Stat. 108, 108 (codified as amended at 48 U.S.C. note prec. § 491 (1988) and Haw. Const. art. XII, § 1), *reprinted in* 1 HRS 167, 167 (1985).

[41] We do not decide the question whether descendants of citizens of the Kingdom of Hawai'i who *did not* inhabit the Hawaiian islands prior to 1778 may also assert customary and traditional rights under the "ancient Hawaiian usage" exception of HRS § 1-1. Furthermore, we expressly reserve comment on the question whether non-Hawaiian members of an "ohana" – meaning "[f]amily, relative, kin group; . . . extended family, clan[,]" *see* Pukui & Elbert, Hawaiian Dictionary 276 (2nd ed. 1986) – may legitimately claim rights protected by article XII, section 7 of the state constitution and HRS § 1-1. *Cf. Morton v. Mancari*, 417 U.S. 535, 555, 94 S.Ct. 2474, 2485, 41 L.Ed.2d 290 (1974) ("As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed.").

the territorial bounds of the United States. *See* Organic Act, § 83; Act of April 30, 1900, c. 339, 31 Stat. 141, 157, *reprinted in* 1 HRS 36, 74 (1985) (as amended).

c.

The court in *Kalipi* suggested that the "Hawaiian usage exception in § 1-1 may be used as a vehicle for the continued existence of those customary rights which continued to be practiced[.]" 66 Haw. at 11-12, 656 P.2d at 751-52. *See also id.* at 10, 656 P.2d at 751 (indicating the court's belief that "retention of a Hawaiian tradition should in each case be determined by balancing the respective interests and harm once it is established that the *application of the custom has continued in a particular area*") (emphasis added); *Pele*, 73 Haw. at 619, 837 P.2d at 1271 (reading *Kalipi* as upholding the right "to practice *continuously exercised* rights . . . so long as no actual harm [is] done by the practice") (emphasis added). The court in *Zimring II* noted further that although "usage must be based on actual practice" and not on assumptions or conjecture, the establishment of traditional usage "would be of little weight" because the practice "would not have carried over into a private property regime within the framework of a private enterprise economic system." 58 Haw. at 116-18, 566 P.2d at 732-33. On the other hand, the *Kalipi* court also indicated that the traditional practices enumerated under HRS § 7-1 remain "available to those who *wish to continue* those ways." *Id.* at 9, 656 P.2d at 750 (emphasis added).

Contrary to the dictum in *Zimring II, supra,* the ancient usage of lands practiced by Hawaiians did, in

fact, carry over into the new system of property rights established through the Land Commission. *Compare Zimring II*, 58 Haw. at 116-18, 566 P.2d at 732-33, *with Kukiiahu v. Gill*, 1 Haw. 54 (1851), and *Kekiekie*, 1 Haw. at 43 (recognizing that ahupua'a tenant's rights were secured by the constitution and could not have been conveyed away "even if the King had not made [the kuleana] reservation[,]" *see supra* note 24). *See also supra* notes 21, 33, and 36 (citing statutory authority and case law that supports this conclusion). Furthermore, the reservation of sovereign prerogatives, *see supra* section IV.B.4 (citing *Reppun*, 65 Haw. at 543-44, 656 P.2d at 66; *McBryde*, 54 Haw. at 184-86, 504 P.2d at 1337-38), in conjunction with limitations on the Land Commission's authority, *see supra* section IV.B.4 (citing L. 1847, at 70-72),[42] confirms that fee simple title in Hawai'i is specifically limited by the sovereign authority to regulate its use. In other words, the right of each ahupua'a tenant to exercise traditional and customary practices remains intact, notwithstanding arguable abandonment of a particular site, although this right is potentially subject to regulation in the public interest. *See supra* note 26 (citing Blackstone's

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[42] The sovereign power to enforce the usufruct of lands may not be lost through inaction, because "there cannot be adverse possession against the sovereign." *State v. Zimring*, 52 Haw. 472, 478, 479 P.2d 202, 204 (1970) (citing *Application of Kelley*, 50 Haw. 567, 445 P.2d 538 (1968)); *cf. Corporation of the Presiding Bishop v. Hodel*, 830 F.2d 374, 383 (D.C.Cir.1987) (indicating that communal land in American Samoa is not eligible for taking by adverse possession), *affirming* 637 F.Supp. 1398 (D.D.C.1986).

Commentaries for the proposition that continuous exercise is not absolutely required to maintain the validity of a custom).

d.

We have stated previously that rights of access and collection will not necessarily prevent landowners from developing their lands. *Pele*, 73 Haw. at 621 n. 36, 837 P.2d at 1272 n. 36 (reiterating "the early holding that article XII, [section] 7 does not require the preservation of . . . [undeveloped] lands in their natural state" and that "*Kalipi* rights only guarantee access to undeveloped lands"); *see also Kalipi*, 66 Haw. at 8 n. 2, 656 P.2d at 749 n. 2. Our analysis in the instant case is consistent with these cases.[43]

The *Kalipi* court justified the imposition of a non-statutory "undeveloped land" requirement by suggesting that the exercise of traditional gathering rights on fully developed property "would conflict with our understanding of the traditional Hawaiian way of life in which *cooperation and non-interference with the well-being of other residents were integral parts of the culture.*" 66 Haw. at 9, 656

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[43] The State's power to regulate the exercise of customarily and traditionally exercised Hawaiian rights, *see* Haw. Const. article XII, § 7, necessarily allows the State to permit development that interferes with such rights in certain circumstances – for example, where the preservation and protection of such rights would result in "actual harm" to the "recognized interests of others." *Kalipi*, 66 Haw. at 12, 656 P.2d at 752. Nevertheless, the State is obligated to protect the reasonable exercise of customarily and traditionally exercised rights of Hawaiians to the extent feasible.

P.2d at 750 (emphasis added). The court also stated that, without the undeveloped land limitation, "there would be nothing to prevent residents from going anywhere within the ahupua'a, *including fully developed property*, to gather the enumerated items." *Id.* at 8, 656 P.2d at 750 (emphasis added); *but see supra* note 23. However, the court did not expressly hold that the exercise of customary gathering practices would be absurd or unjust when performed on land that is less than fully developed.

For the purposes of this opinion, we choose not to scrutinize the various gradations in property use that fall between the terms "undeveloped" and "fully developed." Nevertheless, we refuse the temptation to place undue emphasis on non-Hawaiian principles of land ownership in the context of evaluating deliberations on development permit applications. Such an approach would reflect an unjustifiable lack of respect for gathering activities as an acceptable cultural usage in pre-modern Hawai'i, *see* HRS § 5-7.5 (Supp.1992),[44] which can also be successfully incorporated in the context of our current culture. Contrary to the suggestion in *Kalipi* that there would be nothing to prevent the *unreasonable* exercise of these rights, article XII, section 7 accords an ample legal basis for regulatory efforts by the State. *See also supra* note 23 (citing evidence suggesting that ancient Hawaiian usage

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[44] In accordance with HRS § 5-7.5(b), we are authorized to "give consideration to the 'Aloha Spirit'." The Aloha Spirit "was the working philosophy of native Hawaiians[;] . . . 'Aloha' is the essence of relationships in which each person is important to every other person for collective existence." HRS § 5-7.5(a).

was self-regulating). In other words, the State is authorized to impose appropriate regulations to govern the exercise of native Hawaiian rights in conjunction with permits issued for the development of land previously undeveloped or not yet fully developed.

Depending on the circumstances of each case, once land has reached the point of "full development" it may be inconsistent to allow or enforce the practice of traditional Hawaiian gathering rights on such property. However, legitimate customary and traditional practices must be protected to the extent feasible in accordance with article XII, section 7. *See supra* note 43. Although access is only *guaranteed* in connection with undeveloped lands, and article XII, section 7 does not *require* the preservation of such lands, the State does not have the unfettered discretion to regulate the rights of ahupua'a tenants out of existence.

Thus, to the extent feasible, we hold that the HPC must protect the reasonable exercise of customary or traditional rights that are established by PASH on remand.

V. *NONE OF NANSAY'S PROPERTY INTERESTS HAVE BEEN TAKEN*

It is a fundamental rule under the United States and Hawai'i Constitutions that the uncompensated taking of private property is prohibited. The recognition and protection of Hawaiian rights give rise to potential takings claims under two theories: judicial taking and regulatory taking.

A. *Judicial Taking*

Under the judicial taking theory, when a judicial decision alters property rights, the decision may amount to an unconstitutional taking of property. *See Chicago, Burlington & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 235, 17 S.Ct. 581, 584, 41 L.Ed. 979 (1897); *see also Hughes v. Washington*, 389 U.S. 290, 296-98, 88 S.Ct. 438, 442-443, 19 L.Ed.2d 530 (1967) (Stewart, J., concurring) (suggesting that a state supreme court's decision – that the state owned accreted land built up by the ocean – amounted to a sudden, unpredictable, and unforeseeable change in state property law, which amounted to an unconstitutional judicial taking). However, the judicial taking theory is "by no means a settled issue of law." *Corporation of Presiding Bishop v. Hodel, aff'd*, 830 F.2d 374, 381 (D.C.Cir.1987) (declining to decide the question whether a judicial taking occurred), *affirming* 637 F.Supp. 1398 (D.D.C.1986); *see also Hodel*, 637 F.Supp. at 1407 (rejecting a takings claim based on a decision by the High Court of American Samoa). Assuming, without deciding, that the theory is viable, a judicial decision would only constitute an unconstitutional taking of private property if it "involve[d] retroactive alteration of state law such as would constitute an unconstitutional taking of private property." *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 337 n. 2, 94 S.Ct. 517, 531, 38 L.Ed.2d 526 (1973) (Stewart, J., dissenting).[45]

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[45] The majority in *Bonelli* mentioned the judicial taking theory, but did not rely upon it, in reversing the judgment of the Arizona Supreme Court. In addition, *Bonelli* was overruled on other grounds in *Oregon v. Corvallis Sand and Gravel Co.*, 429 U.S.

In the instant case, Nansay argues that the recognition of traditional Hawaiian rights beyond those established in *Kalipi* and *Pele* would fundamentally alter its property rights. However, Nansay's argument places undue reliance on western understandings of property law that are not universally applicable in Hawai'i. Moreover, Hawaiian custom and usage have always been a part of the laws of this State. Therefore, our recognition of customary and traditional Hawaiian rights, as discussed in section IV.B., *supra*, does not constitute a judicial taking.

B. *Regulatory Taking*

A regulatory taking occurs when the government's application of the law to a particular landowner denies all economically beneficial use of his or her property without providing compensation. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, ___, 112 S.Ct. 2886, 2895, 120 L.Ed.2d 798 (1992). However, not every limitation on the use of private property will constitute a "taking." For instance, the government "assuredly [can] . . . assert a permanent easement that [reflects] a pre-existing limitation upon the landowner's title." *Lucas*, 505 U.S. at ___, 112 S.Ct. at 2900. Furthermore, conditions may be placed on development without effecting a "taking" so long as the conditions bear an "essential nexus" to legitimate state interests and are "roughly proportional" to the impact of the proposed development. *Dolan v. City of*

363, 97 S.Ct. 582, 50 L.Ed.2d 550 (1977) (overruling *Bonelli* to the extent that it called for application of federal common law to determine ownership of a river bed in Oregon).

Tigard, ___ U.S. ___, ___-___, 114 S.Ct. 2309, 2317-19, 129 L.Ed.2d 304 (1994).

In the instant case, the HPC must consider PASH's alleged customary rights on remand. As we have held in section IV.B.5.d. of this opinion, if such rights are established, the HPC will be obligated to protect them to the extent possible. This may involve the placement of conditions on Nansay's permit to develop its land. No determination as to the extent of any applicable limitations on Nansay's ability to develop its land may be made until the HPC holds a contested case hearing in accordance with this opinion. For that reason, we agree with Nansay that any claim alleging a regulatory taking would be premature at this time. *See, e.g., Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 185-86, 105 S.Ct. 3108, 3116, 87 L.Ed.2d 126 (1984); *cf. Robinson v. Ariyoshi*, 441 F.Supp. 559, 585-86 (D.Haw.1977), *aff'd*, 753 F.2d 1468, 1474 (9th Cir.1985), *vacated*, 477 U.S. 902, 106 S.Ct. 3269, 91 L.Ed.2d 560 (1986), *dismissed*, 887 F.2d 215 (9th Cir.1989).[46]

VI. *CONCLUSION*

This court has jurisdiction over the instant appeal under HRS § 91-14. Having effectively curtailed PASH from developing a complete record, Nansay and the HPC cannot complain about a procedural remand. The CZMA

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[46] The United States Court of Appeals for the Ninth Circuit "conclude[d] that even if the State of [Hawai'i] has placed a cloud on the title of the various private owners, this inchoate and speculative cloud is insufficient to make this controversy ripe for review." 887 F.2d at 218-19.

requires the HPC to give the cultural interests asserted by PASH "full consideration." In addition, both the CZMA and article XII, section 7 of the Hawai'i Constitution (read in conjunction with HRS § 1-1), obligate the HPC to "preserve and protect" native Hawaiian rights to the extent feasible when issuing a SMA permit. Finally, this decision does not effect a judicial taking of Nansay's private property because it is grounded in preexisting principles of State property law.

Accordingly, we affirm the ICA's decision and remand to the HPC for further proceedings consistent with the foregoing analysis.

PUBLIC ACCESS SHORELINE HAWAII, by Jerry ROTHSTEIN, its coordinator; and Angel Pilago, Appellants-Appellees,

v.

HAWAII COUNTY PLANNING COMMISSION, by Fred Y. FUJIMOTO in his capacity as its chairman; and Nansay Hawaii, Inc., a Hawaii corporation, Appellees-Appellants.

No. 15460.

Intermediate Court of Appeals of Hawai'i.

Jan. 28, 1993.

Certiorari Granted (2 Applications)
May 7, 1993.

Syllabus by the Court

1. The standard of review of an administrative agency's decision is the same for the appellate court as it is for the circuit court. Review of the agency's decision is confined to the record before the agency.

2. The Hawaii County Planning Commission's (Commission) Rule 9 provides for a public hearing on a Special Management Area Permit (SMAP) application, but does not provide for contested case hearing procedures as set forth in Hawaii Revised Statutes (HRS) § 91-9 (1985). The Commission's Rule 4 governs "Contested Case Hearing Procedures" and requires that a person requesting such hearing procedures show that he or she has an interest in the proceeding that is clearly distinguishable from the general public.

3. The determination of the interests of the general public and those of the individual requesting contested case hearing procedures under Rule 4 is a determination of fact reviewable for clear error.

4. Whether the interest of the individual requesting contested case hearing procedures is clearly distinguishable from the interests of the general public so as to entitle the individual to contested case hearing procedures under Rule 4 is a legal conclusion reviewable on the basis of whether the Commission's conclusion is right or wrong.

5. A native Hawaiian who has exercised such rights as were customarily and traditionally exercised for subsistence, cultural, and religious purposes on undeveloped lands of an ahupua'a has an interest in a proceeding for the approval of an SMAP for the development of lands within the ahupua'a which are clearly distinguishable from that of the general public.

6. Native Hawaiian gathering rights are derived from three sources: article XII, § 7 of the Hawaii State Constitution, and HRS §§ 7-1 and 1-1.

7. Native Hawaiian rights protected by article XII, § 7 may extend beyond the ahupua'a in which a native Hawaiian resides where such rights have been customarily and traditionally exercised in this manner.

8. Article XII, § 7 imposes on the Commission the same obligation to preserve and protect native Hawaiian rights as it does on the court.

9. In light of article XII, § 7, all government agencies undertaking or approving development of undeveloped

land are required to determine if native Hawaiian gathering rights have been customarily and traditionally practiced on the land in question and explore the possibilities for preserving those rights.

Roy Arnold Vitousek, III (J. Robert Arnett, II and Nani Rapoza, with him on the briefs), Kailua-Kona, for appellant Nansay Hawaii, Inc.

Joseph Kalani Kamelamela, Deputy Corp. Counsel, Hilo, for appellant Hawaii County Planning Com'n.

Paul Pickering Spaulding, III (Arnold L. Lum and John L. Olson, with him on the brief), Honolulu, for appellees PASH and Pilago.

Before BURNS, C.J., and HEEN and WATANABE, JJ.

HEEN, Judge.

This case began as an appeal to the third circuit court by Appellants-Appellees Public Access Shoreline Hawaii (PASH) and Angel Pilago (Pilago) from Appellee-Appellant Hawaii County Planning Commission's (Commission) decision (Decision) denying their request for contested case hearing procedures on Appellee-Appellant Nansay, Hawaii, Inc.'s (Nansay) application for a Special Management Area Use Permit (SMAP) pursuant to the Coastal Zone Management Act (CZMA), Hawaii Revised Statutes (HRS) chapter 205A (1985 & Supp.1991), and approving the SMAP.[1]

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[1] The notice of appeal in this case challenged the issuance of the SMAP and the denial of Appellants-Appellees' request

After a thorough review of the record, and in light of the law regarding native Hawaiian rights, we vacate the Commission's denial of PASH's request for a contested case hearing and remand to the Commission with instructions to grant PASH's request. However, we affirm the Commission's denial of Pilago's request.

PASH'S REQUEST

1.

Nansay applied to the Commission for the SMAP on March 7, 1990. The Commission held public hearings on the application on September 28, 1990, and November 8, 1990, during which many people testified or presented written testimony favoring and opposing Nansay's application. At the September 28, 1990 hearing PASH, an unincorporated community organization whose purpose is to preserve and protect public access to beaches and shorelines, requested a contested case hearing. At the November 8, 1990 hearing, PASH presented the Commission with several grounds for its request. The Commission

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for a contested case hearing. However, their briefs in circuit court and in this court do not challenge the merits of the SMAP. At oral argument in this court, counsel for Appellants-Appellees stated that it would have been inconsistent to have attacked the permit itself while still claiming error in the Commission's denial of a contested case hearing. In our view, Appellants-Appellees' failure to present arguments attacking the SMAP is not fatal to this appeal since, as we will discuss below, the Commission abused its discretion in denying Appellants-Appellees' request. As will be seen later in this opinion, the Commission's error effectively undermines the validity of the SMAP.

concluded that under the Commission's rules (Rules) PASH did not have a sufficient interest in the proceeding to entitle PASH to contested case hearing procedures. Thereafter, the Commission approved the SMAP, and PASH appealed to the circuit court.

After a hearing on PASH's appeal, the circuit court entered findings of fact, conclusions of law, and an order (Order) in which it concluded that,

> it was clearly erroneous in view of the reliable, probative, and substantial evidence on the record for the Commission to determine that the parties requesting a contested case hearing did not have interests clearly distinguishable from that of the general public and therefore did not have standing to request a contested case hearing.

The Commission and Nansay have appealed the Order.

2.

It is clear from the record that the Order is based in large measure on an affidavit filed in the circuit court by PASH in which Malani Pai (Pai), who had testified before the Commission that he and his ancestors had customarily gathered opae[2] in and maintained the anchialine ponds[3] on Nansay's property, averred that he was a member of PASH. PASH submitted the affidavit to support its

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[2] General name for shrimp. M. Pukui and S. Elbert, Hawaiian Dictionary 291 (1986).

[3] Per the record, anchialine ponds are shoreline pools without surface connection to the sea having waters of measurable salinity and showing tidal rhythms. The ponds are commonly

assertion that its native Hawaiian members were affected by the Decision. The Commission's record does not contain evidence of Pai's membership in PASH. Nansay argues here that the Order is invalid because the circuit court did not confine its review to the record as required by HRS § 91-14(f) (1985).

We agree that the circuit court erred in considering Pai's affidavit. Nevertheless, the error can be corrected in this court, since our standard of review is the same as that of the circuit court. *IBEW, Local 1357 v. Hawaiian Tel. Co.*, 68 Haw. 316, 713 P.2d 943 (1986); *Kilauea Neighborhood Ass'n v. Land Use Comm'n*, 7 Haw.App. 227, 751 P.2d 1031 (1988). Accordingly, our review of PASH's appeal will be confined to the record before the Commission.

3.

On appeal, PASH concedes that a contested case hearing is not required by the CZMA;[4] however, PASH argues that on the record in this case it was entitled to contested case hearing procedures under Rules 9 and 4.

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located in recent lava flows which had depressions deep enough to reach the water table. The ponds consist of brackish water with a crustacean-mollusk dominated faunal community along with several species of shrimp and a variety of vegetation types. The ponds undergo a natural process of senescence over time, changing from barren lava pools to pools with sediment bottoms and aquatic vegetation, and finally to partially filled marshes or grasslands.

[4] *See* Hawaii Revised Statutes (HRS) § 205A-29 (Supp.1991); *Sandy Beach Defense Fund v. City Council*, 70 Haw. 361, 773 P.2d 250 (1989).

Rule 9 provides generally for the procedures to be used in processing SMAP petitions. Rule 9 provides for a public hearing on SMAP petitions but does not provide for contested case hearing procedures as set forth in HRS § 91-9 (1985).[5]

Rule 4 governs "Contested Case Hearing Procedures," and requires that a person requesting such hearing procedures must show that he or she has an interest in the proceeding that is clearly distinguishable from the general public.[6] PASH is a person in accordance with Rule 4-2(7).

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[5] HRS § 91-9 (1985) requires that all parties shall be afforded a hearing after reasonable notice. The statute sets forth the requisites of proper notice, provides that all parties shall have the opportunity to present evidence and argument on all issues involved, and limits the agency's consideration only to matters in the record.

[6] Rule 4-2 defines the terms pertinent to a contested case as follows:

> 4-2 *Definitions*
>
> (5) "Contested case" means a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing.
>
> (6) "Party" means any person or agency named or admitted as a party or properly seeking and entitled as of right to be admitted as a party in a proceeding. More specifically, it includes the following, upon the filing of timely requests:
>
> (A) Any state or county agency, and (B) Any person who has some property interest in the land, who lawfully resides on the land, or who can demonstrate that that person will be so directly and immediately affected by the Commission's decision that that person's interest in the proceedings is clearly distinguishable from that of the general public;

The determination of the interests of the general public and those of the individual requesting contested case hearing procedures under Rule 4 is a determination of fact reviewable for clear error. *Protect Ala Wai Skyline v. City Council*, 6 Haw.App. 540, 544, 735 P.2d 950, 953 (1987). Whether the interest of the individual requesting contested case hearing procedures is clearly distinguishable from the interests of the general public so as to entitle the individual to contested case hearing procedures under Rule 4 is a legal conclusion reviewable on the basis of whether the Commission's conclusion is right or wrong. *Id.* With those principles in mind, we consider the Decision.

4.

Nansay seeks to develop a resort complex consisting of two hotels containing 800 and 250 rooms, a golf course

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provided that such agency or person must be specifically named or admitted as a party before being allowed to participate in the contested case hearing.

(7) "Person" means any individual, partnership, firm, association, trust, estate, corporation, or other legal entity of any character other than an agency.

Rule 4-6(a) provides:

4-6 *Prehearing Procedure*

(a) **Request for Contested Case Hearing Procedure.** A person or agency may request that a contested case hearing procedure be used in a hearing on a particular matter, provided that such request shall be made before or during the Commission's first public meeting on that matter, and not after such meeting.

and clubhouse, 330 multiple family residential units, 380 single family residential units, and other related improvements.[7] The project is located within the ahupua'a[8] of Kohanaiki and covers 450.09 acres. It has approximately 7,200 feet of coastline and an average depth of 4,500 feet from the coastline. Included within the proposed development are several anchialine ponds. Nansay's development impinges on the general public's access to and use of the beach area and the anchialine ponds, lateral movement along the beach, and existing ocean view planes.

At both public hearings before the Commission, all the witnesses were placed under oath. The persons testifying in opposition to the SMAP were generally concerned with the effect that Nansay's development would have on historic and cultural sites, access to and use of the beach area for surfing, fishing, swimming, picnicking, camping, and a number of other outdoor activities. Nearly all attested that they, their ancestors, friends, and family have used the area for such purposes over a long period of time. Some speakers were opposed to any interference with the view plane to the ocean. The opponents of the SMAP either opposed the development outright or demanded assurance of continued access and use.

At the September 28, 1990 hearing, Marcel Keanaina testified as follows:

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[7] Nansay apparently also has plans for a marina development in the future. However, that proposal is not a part of Nansay's petition in this case.

[8] Land division usually extending from the mountains to the sea. *In re Boundaries of Pulehunui*, 4 Haw. 239 (1879).

> In the late 1920's and early 1930's [my family] talked about seeing two fishermen, Kanakamaikai and Pali who lived at Honokohau and went to the opae ponds to get bait to fish for opelu.[9]

(Footnote added.)

At the November 8, 1990 hearing, Pai testified, in part, as follows:

> I'm a resident of Honokohau Village. For generations my family and others have been utilizing and maintaining the anchialine ponds at Kohanaiki. I'm very concerned that in the pond management plan of the proposed Nansay development at Kohanaiki, there's no acknowledgment of native Hawaiian access to the anchialine ponds. I am worried that I will be prevented from harvesting and working the ponds for opaeula and opaelulu. We use the opaeula for catching opelu and then the opelu to catch ahi. We use the opaelulu to catch the uu, aweoweo, akule and wekeula. We are concerned that we will be cited for trespassing as we attempt to continue this important part of our livelihood.

At the September 28, 1990 hearing on the SMAP petition, the PASH representative, Mr. Jerry Rothstein (Rothstein) submitted a written statement. In his statement, Rothstein stated that "Traditional rights of native Hawaiian families to engage in utilizing and maintaining the anchialine ponds at Kohanaiki, may be interrupted or

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[9] Norman Akahai Keanaina also sent a letter to the Commission dated November 8, 1990, in which he stated that the Keanaina family claimed ownership of Kohanaiki.

denied." At the November 8, 1990 hearing at which the Commission considered PASH's request for a contested case hearing, Rothstein stated under oath:

> Another issue, a very important one, is the native Hawaiian fishing and food gathering rights, *of which our members are directly impacted.* [sic] . . . Okay, *that's an impact, the traditional gathering rights which are going to be harvesting, maintaining from those ponds, which our members have engaged in, their families for decades.*

(Emphasis added.)

In a letter to the Commission dated November 8, 1990, Rothstein stated that "PASH has members who are regular users of the area for . . . pond maintainance and harvesting[.] Their interests need to be protected."

The SMAP contains numerous conditions designed to address the concerns expressed by the speakers, including establishment of a program for preserving and maintaining archaeological sites and the anchialine ponds.

5.

As we will now discuss, a native Hawaiian who has exercised such rights as were customarily and traditionally exercised for subsistence, cultural, and religious purposes on undeveloped lands of an ahupua'a has an interest in a proceeding for the approval of an SMAP for the development of lands within the ahupua'a which are clearly distinguishable from that of the general public.

The subject of native Hawaiian gathering rights was first discussed by our supreme court in *Kalipi v. Hawaiian*

Trust Co., 66 Haw. 1, 656 P.2d 745 (1982). In that case, the supreme court held that such gathering rights are derived from three sources: article XII, § 7, of the Hawaii State Constitution, and HRS §§ 7-1 and 1-1 (1985). In article XII, § 7,

> [t]he State reaffirms its obligation and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

In HRS § 7-1, the legislature has provided that "the people" have the right to gather certain enumerated items "from the land on which they live, for their own private use."[10] HRS § 1-1 declares the common law of

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[10] HRS § 7-1 (1985), which was originally enacted in 1851, provides as follows:

> **Building materials, water, etc.; landlords' titles subject to tenants' use.** Where the landlords have obtained, or may hereafter obtain, allodial titles to their lands, the people on each of their lands shall not be deprived of the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way. The springs of water, running water, and roads shall be free to all, on all lands granted in fee simple; provided that this shall not be applicable to wells and water-courses, which individuals have made for their own use.

England as ascertained by English and American decisions to be the common law of Hawaii, "except as otherwise expressly . . . established by Hawaiian usage[.]"

In *Kalipi*, the supreme court held that lawful residents of an ahupua'a may, for the purposes of practicing native Hawaiian customs and traditions, enter undeveloped lands within the ahupua'a to gather the items enumerated in HRS § 7-1. However, those rights are limited to the items enumerated in HRS § 7-1. The supreme court also held that it is obligated "to preserve and enforce such traditional rights" under article XII, § 7. *Id.*, 66 Haw. at 4, 656 P.2d at 748. The *Kalipi* court further stated that HRS § 1-1 ensures the continuation of other native Hawaiian customs and traditions not specifically enumerated in HRS § 7-1 that may have been practiced in certain ahupua'a "for so long as no actual harm is done thereby." *Id.* at 10, 656 P.2d at 751.

In the recent case of *Pele Defense Fund v. Paty*, 73 Haw. 578, 837 P.2d 1247 (1992), the supreme court again discussed native Hawaiian gathering rights, explained *Kalipi*, and expanded on the rights established in *Kalipi*.

In *Pele*, the supreme court explained that, although in *Kalipi* it had recognized the gathering rights of native Hawaiians under HRS § 7-1, *Kalipi* allowed only the residents of an ahupua'a to exercise those rights on undeveloped lands within the ahupua'a. However, based on the record of the constitutional convention of 1978 which promulgated article XII, § 7, the supreme court held in *Pele* that the provision should not be narrowly construed. Accordingly, in *Pele* the supreme court held that "native Hawaiian rights protected by article XII, § 7, may extend

beyond the ahupua'a in which a native Hawaiian resides where such rights have been customarily and traditionally exercised in this manner." *Id.*, 73 Haw. at 620, 837 P.2d at 1272.

The gathering activity described in the record in this case and asserted by PASH as a right of its native Hawaiian members is not enumerated in HRS § 7-1. Consequently, the activity is not entitled to the protection of article XII, § 7, unless it has been shown that it is a right "customarily and traditionally exercised [on the ahupua'a of Kohanaiki] for subsistence . . . purposes and possessed by . . . descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778[.]" Thus, to be entitled to intervention, PASH was required to show that the gathering of opae was customarily and traditionally practiced on the Kohanaiki land and that some of PASH's native Hawaiian members exercised those rights.[11] The record contains sufficient evidence to establish those requisites. Rothstein, Marcel Keanaina and Pai were all under oath when they testified, and their testimony is unrefuted. Their testimony was sufficient to show that the gathering of opae from the anchialine ponds on the ahupua'a of Kohanaiki has been customarily and traditionally exercised by native Hawaiians and by PASH's native Hawaiian members.

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[11] An association may be an aggrieved person with standing to challenge an agency's action if it can show that some of its members are "specifically, personally and adversely affected by the agency's action." *Life of the Land v. Land Use Comm'n*, 61 Haw. 3, 8, 594 P.2d 1079, 1082 (1979).

In *Pele* the supreme court stated that,

> the rights of native Hawaiians are a matter of great public concern in Hawaii. This court has repeatedly demonstrated its fundamental policy that Hawaii's state courts should provide a forum for cases raising issues of broad public interest, and that the judicially imposed standing barriers should be lowered when the "needs of justice" would be best served by allowing a plaintiff to bring claims before the court. *Life of the Land v. The Land Use Comm'n*, 63 Haw. 166, 176, 623 P.2d 431, 441 (1981) ("Our touchstone remains 'the needs of justice.' ")[.]

Id., 73 Haw. at 614-15, 837 P.2d at 1268-69.

Article XII, § 7, imposes on the Commission the same obligation to preserve and protect native Hawaiian rights as it does on the court. *See generally Pac. N'west Bell Tel. Co. v. Sabin*, 21 Or.App. 200, 534 P.2d 984 (1975).

In concluding that PASH had not shown that its interest in the proceeding was clearly distinguishable from that of the general public, the Commission disregarded the rules regarding the gathering rights of native Hawaiians and its obligation to preserve and protect those rights. Thus, PASH was entitled to contested case hearing procedures, and the Commission erred as a matter of law when it denied PASH's request.

We are aware that *Kalipi* and *Pele* only guarantee access to undeveloped lands and do not require that any lands be held in their natural state for the exercise of

native Hawaiian rights.[12] *Pele*, 73 Haw. at 621 n. 36, 837 P.2d at 1272 n. 36. Also, *Kalipi* and *Pele* do not discuss the question of what happens to those gathering rights in a situation, such as we have here, where the property owner wishes to develop his property. However, it is our view, in light of article XII, § 7, that all government agencies undertaking or approving development of undeveloped land are required to determine if native Hawaiian gathering rights have been customarily and traditionally practiced on the land in question and explore the possibilities for preserving them. At least that much is required by article XII, § 7.

On remand, it may be feasible for the Commission to impose some reasonable conditions on the SMAP to protect the native Hawaiian rights in this case where those conditions would not cause actual harm.[13] *See Kalipi*, 66

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[12] The requirement that these rights be exercised on undeveloped land is not, of course, found within the statute. However, if this limitation were not imposed, there would be nothing to prevent residents from going anywhere within the ahupua'a, including fully developed property, to gather the enumerated items. In the context of our current culture this result would so conflict with understandings of property, and potentially lead to such disruption, that we could not consider it anything short of absurd and therefore other than that which was intended by the statute's framers.

Kalipi v. Hawaiian Trust Co., 66 Haw. 1, 8, 656 P.2d 745, 750 (1982).

[13] We emphasize, however, that the Commission is not compelled to do so, since the property will no longer be undeveloped lands.

Haw. at 10, 656 P.2d at 751 ("[T]he retention of a Hawaiian tradition should in each case be determined by balancing the respective interests and harm once it is established that the application of the custom has continued in a particular area."). For example, we note that a condition of the SMAP reads as follows:

> An anchialine pond management plan shall be submitted to and approved by the Planning Director prior to receipt of Final Plan Approval of any of the proposed uses or prior to conducting any land preparation activity in the affected area, whichever occurs first. The Management Plan shall be developed in consultation with the Army Corps of Engineers and the U.S. Fish and Wildlife Service. The objective of its management plan shall be to: 1) maintain the environmental integrity of the existing ponds, 2) protect and manage this resource to provide educational and interpretive opportunities to the public, 3) control and monitor construction activities so that impacts may be identified and mitigated to avoid any detrimental impacts to the pond, and 4) provide for a pond manager to implement the management plan and conduct scientific monitoring programs. The Management Plan will detail the area of ponds to be preserved, the dimensions of buffer zones surrounding the pond area, allowable activities within the pond areas, if any, and establish a pond management program.

Perhaps the Commission could have included in the condition a provision protecting the opae gathering activities as a part of the anchialine pond management program. Such a condition would appear to be in keeping

with the objectives and policies of the CZMA as expressed in HRS § 205A-2.

PILAGO'S REQUEST

Pilago testified before the Commission that his interest in the proceeding was that he felt that Nansay's development would destroy important cultural sites, including perhaps the burial ground of King Kamehameha.[14] He contended that "Hawaiians deserve conclusive and irrefutable proof that no burial site is desecrated. Should investigations show evidence of a burial site, then that area must be preserved and protected." Pilago did not claim to have exercised any cultural or religious activities on the property.

It must be conceded that, as a Hawaiian, Pilago has a "special" interest in the proceeding. However, Pilago did not assert that he or other native Hawaiians had engaged in any activities that might be protected under article XII, § 7. Therefore, Pilago did not show that his interest is "personal," i.e., that it is clearly distinguishable from that of the general public. While Pilago's concern for the possibility that King Kamehameha is buried on the project site is more specific than the concern for cultural site preservation expressed by others at the hearings, it is not enough, in our view, to satisfy Rule 4-2(6)(B).[15]

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[14] We take judicial notice that King Kamehameha's burial place is unknown.

[15] One policy of the coastal Zone Management Act is to "[i]dentify and analyze significant archaeological resources[,]" HRS § 205A-2(c)(2)(A) (1985), and to "[m]aximize information

CONCLUSION

The Commission's denial of PASH's request for contested case hearing procedures is vacated, and this matter is remanded to the Commission with instructions to grant PASH's request for contested case hearing procedures. The Commission's denial of Pilago's request is affirmed.

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retention through preservation and remains and artifacts or salvage operations." HRS § 205A-2(c)(2)(B) (1985). In accordance with that policy, the SMAP requires the Planning Department to approve an archaeological site preservation plan to be prepared by Nansay, and requires Nansay to cease work if unanticipated archaeological sites are uncovered and not to resume work until permitted to do so by the Planning Director.

cc: A. Lum
J. Olson
✓R. Vitousek
J. Kamelamela

IN THE CIRCUIT COURT OF THE THIRD CIRCUIT

STATE OF HAWAII

PUBLIC ACCESS SHORELINE HAWAII, by JERRY ROTHSTEIN, its coordinator; and ANGEL PILAGO, Appellants, vs. HAWAII COUNTY PLANNING COMMISSION, by FRED Y. FUJIMOTO, in his capacity as its chairman, and NANSAY HAWAII, INC., a Hawaii Corporation, Appellees.	CIVIL NO. 90-293K FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER (Filed June 7, 1991)

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

This matter having come before the Court on May 28, 1991, on appeal from a decision by the Hawaii County Planning Commission, Appellant Public Access Shoreline Hawaii ("PASH") represented by Arnold Lum, Appellant Angel Pilago ("PILAGO") represented by John Olson, Appellee Hawaii County Planning Commission ("COMMISSION") represented by J. Kamelamela, Nansay Hawaii, Inc. represented by R. Vitousek, and the Court,

having heard the arguments of counsel, having considered the briefs submitted, as well as the records and files herein, hereby enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

To the extent these Findings of Fact contain Conclusions of Law, they shall be deemed as such.

1. Appellant PASH is a public-interest membership organization based in Kailua-Kona, Hawaii, whose coordinator is Jerry Rothstein. Malani Pai, a member of PASH, is a resident of Honokohau, North Kona, Hawaii.

2. Appellant Angel Pilago is a native Hawaiian who resides in Kailua-Kona.

3. Appellee Commission is an agency of the County of Hawaii having authority to rule on requests for contested case hearings in SMA permit proceedings pursuant to Rule 4 of the Rules of the Planning Commission, County of Hawaii.

4. Appellee Nansay Hawaii, Inc. is a Hawaii corporation which has applied for an SMA Use Permit in the Kohanaiki area, North Kona, County and State of Hawaii. Nansay has objected to this Court's exercise of jurisdiction and has made a special appearance in this matter.

5. On September 28, 1990 and November 8, 1990, the Commission held public hearings to take testimony regarding the review and issuance of an SMA Use Permit within the Coastal Zone Management Area on an application made by Nansay Hawaii, Inc.

6. During the course of the proceedings, several parties requested that a contested case hearing be held regarding the review and issuance of this SMA permit.

7. PASH, through Jerry Rothstein as spokesman, requested a contested case hearing and asserted standing with interests other than those of the general public, including negotiating Kohanaiki issues with prior owners of the property, discussing accurate delineation of the shoreline, and as regular users of the area for surfing, fishing, running, beachcombing, anchialine pond maintenance and diving.

8. Malani Pai, a member of PASH and native Hawaiian, and his family have gathered opae from the anchialine ponds on the Kohanaiki property for several generations. The opae have been used by the family for fishing offshore from Kohanaiki.

9. Angel Pilago, a native Hawaiian, requested a contested case hearing, based upon his practicing native Hawaiian religion upon the Kohanaiki property.

10. The credibility or the bona fides of the Appellants' asserted interests and their asserted injuries were not in issue nor challenged by the Commission.

11. The Commission voted against Appellants' requests for a contested case hearing. Three Commissioners stated on the record that Appellants' interests were not clearly distinguishable from that of the general public and thus did not have standing to request a contested case hearing under County Planning Commission Rule 4-2(6)(B).

12. On November 8, 1990 the Commission voted to approve Nansay's application for SMA Use Permit No. 305 to allow the construction of an 800-room hotel and a 250-room hotel, 18-hole golf course and clubhouse, 330 multiple family residential units, 380 single-family residential units, and other related resort infrastructure and related improvement at Kohanaiki.

13. Appellants filed a timely Notice of Appeal with this Court on November 26, 1990, challenging the Commission's denial of Appellants' standing to request a contested case hearing.

14. On February 28, 1991, the Court issued its Order Granting Appelants' Motion to Amend Notice of Appeal to the Circuit Court and to Join Nansay Hawaii, Inc., the SMA permit applicant, as Appellee and indispensable party.

CONCLUSIONS OF LAW

To the extent these Conclusions of Law contain Findings of Fact, they shall be deemed as such.

1. The Court has jurisdiction over PASH, Pilago, and the Commission. Nansay Hawaii, Inc. has made a special appearance in this matter and has property interests in North Kona which are affected by this matter.

2. Persons with interests special and personal unto themselves have standing to act to legally protect these interests from injury. *Mahuiki v. Planning Commission et al.*, 65 Haw. 506, 515 (1982).

3. Appellants interests, such as gathering opae from the anchialine ponds, fishing from the Kohanaiki property, and practicing traditional Hawaiian religion on the property are interests special and personal unto themselves and therefore the Appellants have standing to act to legally protect these interests from injury.

4. Persons with special and personal interests which are clearly distinguishable from those of the general public and whose interests are injured by the actions of an agency have standing to request a contested case hearing under County Planning Commission Rule 4-2.

5. The parties requesting a contested case hearing clearly stated the nature of their injuries. These were neither disputed nor challenged by the Commissioners.

6. Based on the record, the Court concludes that it was clearly erroneous in view of the reliable, probative, and substantial evidence on the record for the Commission to determine that the parties requesting a contested case hearing did not have interests clearly distinguishable from that of the general public and therefore did not have standing to request a contested case hearing.

ORDER

THEREFORE, IT IS HEREBY ORDERED THAT this matter be remanded to the Commission and a contested case hearing shall be held, pursuant to Appellants' requests.

DATED: Kealakekua, Hawaii, 7 June 91 .

/s/ Ronald Ibarra
JUDGE OF THE
ABOVE-ENTITLED COURT

Civ. No. 90-293K; PASH and Angel Pilago v. County and Nansay Hawaii; Findings of Fact, Conclusions of Law, and Order.

(SEAL) **Planning Commission**

Larry S. Tanimoto
Mayor

25 Aupuni Street, Rm. 109 • Hilo, Hawaii 96720 •
(808) 961-8288

CERTIFIED MAIL

November 29, 1990

Mr. Roy A. Vitousek III
Cades Schutte Fleming & Wright
Suite B-303, Hualalai Center
75-170 Hualalai Road
Kailua-Kona, HI 96740

Dear Mr. Vitousek:

Special Management Area Use Permit Application
Nansay Hawaii, Inc.
Tax Map Key 7-3-09:3 & 16

Please refer to our letter of November 19, 1990, in which you were informed of the Planning Commission's decision on the above application.

Please attach the enclosed Exhibit I to that letter.

Please feel free to contact the Planning Department if there are any questions on this matter.

Sincerely,

/s/ Fred Y. Fujimoto
Fred Y. Fujimoto
Chairman, Planning
Commission

Encl.

xc: Mr. Thomas Yamamoto, Nansay Hawaii, Inc.
Mr. Kevin Seiter
Mr. Jerry Rothstein
Mr. Angel Pilago
Mr. Thomas Fee
Department of Public Works
Department of Water Supply
Civil Defense
County Real Property Tax Division
State Department of Health
State Dept. of Transportation, Highways Division
Planning Office – Kona
OSP, CZM Program
DLNR

EXHIBIT I

CADES SCHUTTE FLEMING & WRIGHT

ATTORNEYS AT LAW

Kailua-Kona, Hawaii Office
Suite B-303
Hualalai Center
75-170 Hualalai Road
Kailua-Kona, Hawaii 96740
Telecopier: (808) 326-1175
Telex: 7238589
Cable: LEX

Telephone: (808) 329-5811

November 2, 1990

[Names Omitted In Printing]

Kevin R. Seiter, Esq.
Kona Inn Village
75-5744 Alii Drive
Suite 245
Kailua-Kona, HI 96740

Re: Friends of Kohanaiki, et al., v. Nansay Hawaii, et al., Civil No. 90-255K

Dear Kevin:

The purpose of this letter is to memorialize the terms of the settlement agreement between our respective clients. As of my October 9, 1990 letter, I will try to set out the basic terms of our settlement agreement in a non-legalistic manner. Both parties anticipate the need to enter a formal stipulation and settlement agreement or stipulated judgment which recites, in detail, the full terms of our agreement. At the same time, it is intended that this letter agreement is binding on the parties with respect to the terms and conditions it contains.

1. *Kohanaiki*: Nansay Hawaii, Inc. ("Nansay") will not interfere with public vehicular access or use of the shoreline "jeep trail" for recreational purposes as defined in H.R.S. Chapter 520 from the northern boundary of the Kohanaiki property (where it abuts on the O'oma property) to the southern boundary of the Kohanaiki property (where it abuts on the National Park Service's Kaloko property) until such time as improved public vehicular accesses (A) and (B) as set out below have been constructed and opened to the public. When the improved public accesses (A) and (B) as described hereinbelow have been completed and opened to the public, Nansay will grant a nonexclusive easement, access right, or right-

of-way to the State of Hawaii, Department of Land and Natural Resources, Na Ala Hele program, to incorporate that section of the trail in Na Ala Hele's Ala Kahakai demonstration trail as outlined in the attached letter dated October 15, 1990 from the Department of Land and Natural Resources Director, William W. Paty and addressed to Mr. Duane Kanuha, Planning Director (Exhibit "B"). The portion of the Kohanaiki property not included in the pending SMA application will be referred to as the "southern portion" of the Kohanaiki property.

Access point "B" will provide vehicular access to the shoreline of the southern portion of the Kohanaiki property, and Nansay will agree to not interfere with public vehicular access and use of the shoreline "jeep trail" within the southern portion of the Kohanaiki property for recreational purposes as defined by H.R.S. Chapter 520 until such time as Nansay undertakes construction of improvements in that area pursuant to appropriate governmental permits.

Nansay will agree that as part of construction of improvements in the southern portion of the Kohanaiki property, Nansay will provide mauka-makai vehicular access to the shoreline in this area, including parking, bathroom facilities, and shower facilities as setout as improved public access (C) hereinbelow and on Exhibit "A."

At the time access point (C) is constructed and open to the public, a nonexclusive easement, access, or right-of-way over the shoreline trail will be granted by Nansay to the State of Hawaii, Department of Land and Natural

Resources, Na Ala Hele program for inclusion in the Ala Kahakai demonstration trail.

At the time access point (C) is completed and open to the public, access point (B) will remain as a mauka-makai public access point (subject to relocation) which will provide access from the paved road system in the Kohanaiki development to (but not along) the shoreline in the vicinity of the northern boundary of the southern portion of the Kohanaiki property.

The improved public vehicular access points will be:

a) a paved mauka-makai vehicular access road to "Pine Trees" beach, including parking, bathrooms, showers; (Exhibit "A" Number 1)

b) a four-wheel drive access road from the paved road system in the Kohanaiki development to the shoreline in the vicinity of the northern boundary of the southern portion which will permit the public to utilize the "jeep trail" within the southern portion until such time as Nansay undertakes construction of improvements in that area and which after construction of improvements in the southern portion have been completed will be limited to vehicular access to but not along the shoreline in the vicinity of the northern boundary of the southern portion of the Kohanaiki property (Exhibit "A" number 2); and

c) a paved mauka-makai vehicular access road to the southern portion of the Kohanaiki property, including parking, bathrooms, and showers (Exhibit "A" number 3).

Nansay and/or its successors or assigns will agree to provide unrestricted 24-hour access to the Kohanaiki

shoreline along access points designated in Exhibit "A" hereto subject to reasonable rules and regulations as reviewed and approved by the Planning Department of the County of Hawaii. Nansay further agrees to keep public vehicular access to "Pine Trees" beach open during all phases of construction.

2. *O'oma*: Kahala Capital Corporation ("Kahala"), its successors and assigns, will agree not to interfere with public vehicular access along the shoreline "jeep trail" for recreational purposes as defined by H.R.S. Chapter 520 from the northern boundary of the O'oma property (where it abuts with State-owned HOST Park property) to the southern boundary of the O'oma property (where it abuts on Kohanaiki) until such time as improved, paved mauka-makai public access improvements are completed and opened to the public providing public vehicular access to both the northern and southern shoreline portions of the O'oma property.

Specifically, Kahala, its successors and assigns, agree to include in any plans submitted to the State of Hawaii Land Use Commission and/or County of Hawaii Planning Commission or County Council two vehicular mauka-makai public shoreline access points (north and south) including adequate parking, showers, and changing and bathroom facilities.

The south shoreline access point will be located as near as practicable to the southern boundary of the O'oma property (where it abuts on Kohanaiki) and the north as near as practicable to the HOST Park. Kahala will agree not to interfere with shoreline vehicular access to the existing "jeep trail" until such time as improved

public access points are constructed and opened to the public. At the time improved accesses and facilities are open, Kahala Capital will grant a nonexclusive easement, access, or right-of-way to the State of Hawaii, Department of Land and Natural Resources, for inclusion of the shoreline trail in the Na Ala Hele Ala Kahakai demonstration trail as outlined in the attached letter for use consistent with the description as outlined in the attached letter dated October 15, 1990 from the Department of Land and Natural Resources Director, William W. Paty and addressed to Mr. Duane Kanuha, Planning Director (Exhibit "B").

Kahala, its successors and assigns, will agree not to interfere with continued public mauka-makai access along the unimproved (unpaved) roadway which leads from Kaahumanu Highway to the shoreline "jeep trail" along the southern portion of the O'oma property. [This road will be referred to as the "Old O'oma Road."] The Old O'oma Road intersects the shoreline "jeep trail" on the O'oma property just north of Puhili Point. Kahala will agree to permit use of the road by the public until such time as the alternative mauka-makai access road is constructed and opened to the public. In no event will Kahala, its successors and assigns, dedicate the portion of the longshore "jeep trail" on its property to the State of Hawaii prior to completion of vehicular access and facilities described herein.

Kahala Capital Corporation, Nansay Hawaii, Inc., the Friends of Kohanaiki, Inc., West Hawaii Surfing Association, and Surfrider Foundation will agree to consult with the County and State governments and enter a formal written agreement, stipulated settlement agreement,

and/or stipulated judgment (as deemed appropriate by the parties) memorializing the agreement reached between the parties. Nansay agrees that the terms of this agreement insofar as they relate to Nansay and Kohanaiki may be included as conditions in Nansay's Special Management Area use permit (if granted). Kahala agrees that the terms of this agreement may be included in any Land Use Commission decision and order, Conservation District Use Permit, zoning ordinance, and/or SMA permit which may issued [sic] to Kahala or its successors or assigns with respect to future development of the O'oma property.

In exchange for the above-described undertakings on the part of Nansay and Kahala, plaintiffs will agree to withdraw their request for contested case consideration with respect to Nansay's SMA application currently pending before the County of Hawaii Planning Commission and will either 1) dismiss the above-entitled action (Civil No. 90-255K) with prejudice or 2) enter into a stipulated judgment in said action incorporating the terms and conditions of this settlement. If a stipulated judgment is to be entered, the parties will stipulate to certification of the plaintiffs' class described in the Complaint and notice of this settlement shall be provided to the public as required by the Court. The plaintiffs will agree that the statute of limitations with respect to prescriptive vehicular access rights of any description with respect to both the mauka-makai and longshore accesses discussed in this agreement both on the O'oma and Kohanaiki properties is tolled or interrupted effective on the date of this agreement.

It is also agreed between Nansay Hawaii, Kahala Capital Corporation, and the plaintiffs that the undertakings of Nansay under this proposed agreement would be subject to Nansay receiving approval of its petition for a Special Management Area permit, approval of its public access plan, final plan approval as necessary for Nansay to complete construction of improvements on the Kohanaiki property. It is also understood that the undertakings of Kahala under this proposed agreement are subject to Kahala's obtaining appropriate reclassification, zoning, and/or Conservation District Use Permits from the State of Hawaii and/or County of Hawaii to enable Kahala to construct improvements on the O'oma property.

It is agreed that this agreement may be executed in counterparts with the various counterparts taken together to constitute a complete agreement.

I will be submitting this agreement to my clients today for their review and signatures. If they have any changes or corrections, I will so inform you immediately. I ask that you do the same so that the move with all deliberate speed to execution of this letter agreement and preparation of a final stipulated settlement agreement or stipulated judgment in consultation with the State of Hawaii and County of Hawaii.

As always, if you have any questions or need any further information, please contact me at 329-5811.

Very truly yours,

Gino L. Gabrio for
Roy A. Vitousek III
for
CADES SCHUTTE FLEMING
& WRIGHT

APPROVED AND AGREED:

NANSAY HAWAII, INC.

By /s/ Thomas H. Yamamoto

KAHALA CAPITAL CORPORATION

By /s/ Toni Fortin

FRIENDS OF KOHANAIKI, INC.

By /s/ Kevin Seiter

WEST HAWAII SURFING ASSOCIATION

By /s/ Paula McMichael

SURFRIDER FOUNDATION

By /s/ Mark A. Massara

KEVIN SEITER
ATTORNEY AT LAW
KONA INN VILLAGE
75-5744 ALII DRIVE
SUITE 245
KAILUA-KONA, HI 96740

November 8, 1990

Mr. Roy A. Vitousek, III
Attorney at Law
Cades Schutte Fleming & Wright
Suite B-303
75-170 Hualalai Road
Kailua-Kona, Hawaii 96740

Dear Mr. Vitousek,

This is to inform you and your clients, Nansay Hawaii, Inc. and Kahala Corporation that I received authority from my clients: Friends of Kohanaiki, West Hawaii Surfing Association and the Surfrider Foundation to substitute their signature page (page 5 of the agreement dated November 2, 1990) to the revised agreement. My authority is based on my clients accepting the reference to Exhibit "B" which is currently referred to and attached to the revised agreement.

Sincerely,

/s/ Kevin Seiter
KEVIN SEITER
Attorney at Law

to Kahala's obtaining appropriate reclassification, zoning, and/or Conservation District Use Permits from the State of Hawaii and/or County of Hawaii to enable Kahala to construct improvements on the O'oma property.

It is agreed that this agreement may be executed in counterparts with the various counterparts taken together to constitute a complete agreement.

I will be submitting this agreement to my clients today for their review and signatures. If they have any changes or corrections, I will so inform you immediately. I ask that you do the same so that the move with all deliberate speed to execution of this letter agreement and preparation of a final stipulated settlement agreement or stipulated judgment in consultation with the State of Hawaii and County of Hawaii.

As always, if you have any questions or need any further information, please contact me at 329-5811.

Very truly yours,

Roy A. Vitousek III
for
CADES SCHUTTE FLEMING
& WRIGHT

APPROVED AND
AGREED:

NANSAY HAWAII, INC.

By_____

KAHALA CAPITAL
CORPORATION

By_____

FRIENDS OF
KOHANAIKI, INC.

By /s/ Kevin Seiter

WEST HAWAII SURFING
ASSOCIATION

By_____

SURFRIDER
FOUNDATION

By_____

[Exhibit A – Map Omitted In Printing]

EXHIBIT B

[SEAL]

STATE OF HAWAII

DEPARTMENT OF LAND AND NATURAL RESOURCES

P. O. BOX 621

HONOLULU, HAWAII 96809

DOFAW:ks

October 15, 1990

[Names Omitted In Printing]

Mr. Duane Kanuha
Planning Director
Hawaii County Planning Department
25 Aupuni St., Rm. 109
Hilo, HI 96720

Dear Mr. Kanuha:

The Division of Forestry and Wildlife's Na Ala Hele Statewide Trail and Access Program is aware of the public controversy over the vehicular, lateral coastal access road fronting the proposed Kohanaiki Resort. As the State program focusing on Hawaii's trail and access concerns, it has been studying the issue and is taking the following position.

The Na Ala Hele Program opposes motorized vehicular access along that coastal stretch because:

1. Na Ala Hele's priority trail project, the "Ala Kahakai", first planned and proposed by the State in 1973, is intended to be a continuous, pedestrian lateral shoreline trail from the Old Kona Airport in Kailua to Kawaihae. As much as possible the trail is to incorporate existing, historic Hawaiian shoreline trails and maintain a trail experience that is preferably removed from motorized vehicles and conducive to enjoyment and protection of the coast's rich natural and historic resources. This trail concept is consistent with the Kaloko-Honokohau National Historical Park's plan adjacent to Kohanaiki, and other sections of the Ala Kahakai which are currently in place or being restored at Kaupulehu, Kiholo, Waikoloa, Kalahuipuaa, and from Puukohola Heiau, to Spencer Park, and to Mauumae Beach in Kawaihae. Thus, continued use of motorized vehicles in and along the Kohanaiki shoreline would be contrary to the Ala Kahakai's basic objectives.

2. Continued public vehicular use of the coastal road at Kohanaiki, in combination with the future mauka-makai accesses and parking lots required of the resort by Hawaii County, would result in major management responsibilities and concerns which include:

   a. Potentially unsafe conditions when uncontrolled amounts and types of motorized vehicles share the same route with pedestrians of all ages;

   b. Potential overcrowding and overuse of coastal resources, resulting from increases in the numbers of people accessing the coastline and no controls over commercial enterprises wanting to use the road (e.g. dirt bike rentals, scuba diving, snorkeling and scenic tours, etc.); and

   c. The State does not presently have the regulatory and back-up enforcement capabilities that would be required to manage the resources and the expanded public use of the coast that can be expected if the subject road were to remain open to motor vehicle use by the public.

We note that the current impacts of public access use of the road demonstrate the need for active management, even before the anticipated access "improvements" by the planned resort. Biologically sensitive anchialine ponds along the coastal road were closed at the recommendation of the Department of Health following confirmation of pond contamination by human and animal fecal matter. People are apparently using the ponds as toilets and dumping garbage which is boosting the mongoose population.

Na Ala Hele considers the ancient Hawaiian coastal trail that pre-existed the 4-wheel drive access to be owned by the State and prefers that the traditional

Hawaiian coastal trail system be restored in that area to become another increment of the Ala Kahakai demonstration trail.

If you have questions regarding this position statement please call the Division of Forestry and Wildlife's Administrator, Mr. Michael Buck, in Honolulu (548-8850) or Ms. Deborah Chang Abreu, Na Ala Hele's Program Coordinator in Kona (325-7381).

Sincerely,

/s/ Bill
WILLIAM W. PATY

cc: Mr. Michael G. Buck
Mr. Roger Evans
Mr. Fred Fujimoto
Mr. Ralston Nagata
Mr. Kevin Seiter
Mr. Roy A. Vitousek III
Mr. Charles Wakida
Mr. Mason Young

[SEAL] Planning Commission Larry S. Tanimoto Mayor

25 Aupuni Street, Rm. 109 • Hilo, Hawaii 96720
• (808) 961-8288

CERTIFIED MAIL

November 19, 1990

Mr. Roy A. Vitousek III
Cades Schutte Fleming & Wright
Suite B-303, Hualalai Center
75-170 Hualalai Road
Kailua-Kona, HI 96740

Dear Mr. Vitousek:

Special Management Area Use Permit Application
Nansay Hawaii, Inc.
Tax Map Key 7-3-09:3 & 16

The Planning Commission at its November 8, 1990, meeting voted to accept the applicant's Motion for Reconsideration of the Planning Commission's decision to defer action on the application. The Commission also denied the requests by Public Access Shoreline Hawaii (PASH) and Angel Pilago for contested case hearing as it has been found that their interests are not clearly distinguishable from that of the general public.

The Planning Commission also voted to approve the application, Special Management Area Use Permit No. 305 to allow allow [sic] the construction of an 800-room hotel and a 250-room hotel, 18-hole golf course and golf clubhouse, 330 multiple family residential units, 380 single family residential units, tennis and athletic club, beach clubs, artisan's village, child activity center, public park/access, maintenance and wastewater treatment

plant, other resort infrastructure, and related improvement at Kohanaiki, North Kona, Hawaii.

Approval of the SMA Use Permit is based on the following:

> The purpose of Chapter 205-A, *Hawaii Revised Statutes*, and Rule No. 9, Special Management Area Rules and Regulations of the County of Hawaii, is to preserve, protect, and, where possible, to restore the natural resources of the coastal zone areas. Therefore, special controls on development within the area along the shoreline are necessary to avoid permanent loss of valuable resources and the foreclosure of management options.
>
> One of the criteria for approving a development within the SMA is that it is consistent with the General Plan and zoning designation.
>
> The General Plan is a long range, comprehensive policy document which guides the overall development of the County of Hawaii. As stated in Section 3-16 of the County Charter, the General Plan shall contain a statement of development objectives, standards, and principles with respect to the most desirable use of land within the County for residential, recreational, agricultural, commercial, industrial, and other purposes which shall be consistent with proper conservation of natural resources and the preservation of our natural beauty and historical sites; the most desirable density of population in the several parts of the County; a system of principal thoroughfares, highways, streets, public access to the shorelines, and other open spaces; the general locations, relocations and improvement of public buildings, the general

location and extent of public utilities and terminals, whether publicly or privately owned, for water, sewers, light, power, transmit, and other purposes; the extent and location of public housing projects; adequate drainage facilities and control; air pollution; and such other matters as may, in the council's judgment, be beneficial to the social, economic, and governmental conditions and trends and shall be designed to assure the coordinated development of the County and to promote the general welfare and prosperity of its people. The Charter further states that "The (County) council shall enact zoning, subdivision, and such other ordinances which shall contain the necessary provisions to carry out the purpose of the general plan," and that "No public improvement or project, or subdivision or zoning ordinance shall be initiated or adopted unless the same conforms to and implements the general plan."

The proposed development is consistent with the adopted goals, policies, standards, and courses of action as articulated in the General Plan, as amended.

Resort developments are created to satisfy the needs and desires of both visitors and residents. Such areas have basic amenities and attributes which attract the development of visitor accommodations and related facilities. Almost every successful resort area has a harmonious combination of certain characteristics, such as climate, scenery, recreational amenities, level of services, and other man-made facilities. In most instances, such as at Kohanaiki, the natural factors have been or are the basis for the development of an area, and the man-made

facilities were designed to enhance the area. A resort area should be large enough to provide a concentration of hotel, residential, and recreational amenities which will keep the visitor interested and entertained. It should not be so large, however, as to destroy either the sense of scale or intimacy or leisureliness associated with the area. In light of this, the General Plan does set forth standards for the various types of resort destination areas.

The General Plan identifies the Kohanaiki area, which the property is a part of, as an Intermediate Resort Area. An Intermediate Resort Area is a self-contained resort destination area which provides basic and support facilities for the needs of the entire development. Such facilities include sewer, water, roads, employee housing, recreational facilities, etc. The maximum visitor units within an area designated Intermediate Resort Area is 1,500 rooms. The concept of a self-contained resort area also includes the provision of residential accommodations and commercial activities for long-term visitors as well as for permanent residents. Such facilities are considered to be an integral part of a resort area. The proposed improvements will be in the direction of creating a self-contained resort destination at this section of North Kona.

The Land Use and Resort elements of the General Plan also state that resort uses shall be developed in areas adequately served by essential services and other infrastructure. The area under consideration is or will be provided with all essential utilities and services, including

water. The applicant has successfully drilled a well. A second well will also be drilled.

Based on the above, it is felt that the granting of the subject request would complement the policies of the General Plan Land Use and Resort elements which state to "promote and encourage the rehabilitation and utilization of resort areas which are serviced by basic facilities and utilities."

The subject request is also consistent with the Economic element of the General Plan in that the proposed development will provide additional and expanded employment opportunities for residents of the area, as well as the entire island as a whole; will strengthen the existing visitor industry; and will provide residents with opportunities to improve their quality of life.

The area under consideration is also appropriately zoned for the proposed uses.

Another criteria in reviewing an SMA Use Permit application is that "The development will not have any significant adverse environmental or ecological effect, except as such adverse effect is minimized to the extent practicable and clearly outweighed by public health, safety, or compelling public interest. Such adverse effect shall include, but not be limited to, the potential cumulative impact of individual developments, each one of which taken in itself might not have a substantial adverse effect and elimination of planning options." The proposed development is not anticipated to have any substantial adverse environmental or ecological effects. Botanical and terrestrial fauna surveys

conducted by Char & Associates in 1986, indicate that no endangered or threatened plant species will be affected by the proposed development.

As requested by Change of Zone Ordinance No. 88 159, a draft of an anchialine pond management plan was submitted for review and as part of this application. The objective of the management plan is to: 1) maintain the environmental integrity of the existing ponds; 2) protect and management of this resource to provide educational and interpretive opportunities to the public; 3) control and monitor construction activities so that impacts may be identified and mitigated to avoid detrimental impacts to the pond; and 4) provide a pond manager to implement the management plan and conduct scientific monitoring programs. The draft plan currently establishes a 40-foot buffer zone around each of the ponds. The anchialine ponds on the property will be preserved and, where possible, are being integrated into the development design. Therefore, since none of the ponds are expected to be filled, direct and indirect impacts on the pond resources will be negligible.

A full archaeological reconnaissance survey of the entire Kohanaiki property was conducted in 1986. The applicant intends to preserve all sites recommended by the consulting archaeologist. Further, to implement a condition of the previously mentioned change of zone ordinance, a draft *Phase I: Mitigation Plan or Data Recovery, Interim Site Preservation, Burial Treatment, and Monitoring* was prepared in February 1990 by

the applicant's consultant, Paul H. Rosendahl, Ph.D., Inc.

It should be noted that any potential runoff or discharge which could reach ocean waters can be handled by on-site improvements. Negative impacts on the local water quality resulting from soil erosion and runoff during site preparation and construction phases can be adequately mitigated through compliance with existing ordinances and regulations, as well as proposed conditions of approval.

To further mitigate these concerns, during the change of zone approval, a water quality monitoring plan was required. With these precautionary measures in place, the proposed development is not expected to have any substantial adverse effects on the coastal resources or the environment.

Since the proposed buildings will be constructed a great distance from the highway, they are not expected to substantially impede the mauka-makai view plane from Queen Kaahumanu Highway. Further, since the taller hotel structure setback will be substantially makai of the Queen Kaahumanu Highway, the visual impact of the proposed hotel developments will not be substantial.

Finally, the applicant will provide mauka-makai public accesses, as well as a lateral access, to and along the shoreline. Public parking areas, restrooms, shower facilities, and a beach park pavilion will also be provided. To implement a change of zone condition, the applicant submitted for review *A Comprehensive Public Access Plan* dated August 1990. The plan proposed a mauka-makai public access to the shoreline, as

well as a coastal or lateral "beach trail." As part of its proposal, the applicant also intends to close the jeep trail through its property.

Based on the above, it is determined that the proposed development is consistent with the objectives and policies as provided by Chapter 205A, *Hawaii Revised Statutes*, relating to Coastal Zone Management, and the Planning Commission's Rule 9 relating to Special Management Area (SMA). Furthermore, if any adverse environmental or ecological effects exist, such effects are clearly outweighed by public health, safety, or compelling public interest.

Approval of this request is subject to the following conditions:

1. The applicant, successors, or its assigns shall comply with all of the stated conditions of approval.

2. Plans for the first phase of development, including the 800-room hotel, 250-room hotel, and the 18-hole golf course/clubhouse facility, shall be submitted to the Planning Department and Final Plan Approval shall be secured within two years from the effective date of the Special Management Area (SMA) Use Permit. Construction shall commence within one year from the date of receipt of Final Plan Approval and be completed within three years thereafter.

3. Unless a lesser setback is approved by the Planning Director, all proposed buildings, other than those directly related to the golf course operations, shall observe a minimum setback of 100 feet from the edge of

the fairways/greens/tee areas of the golf course. If deemed necessary, additional setbacks or other mitigating measures, such as additional landscaping along certain portions of the golf course boundaries, may be imposed at the time of plan approval review.

4. Fully channelized intersection improvements, including but not limited to deceleration, acceleration, and left-turn storage lanes and streetlighting, shall be provided for at the intersection of Queen Kaahumanu Highway and the proposed main resort entry road meeting with the approval of the State Department of Transportation, Highways Division, prior to the opening of the first hotel. Further, as may be required by the State Department of Transportation, Highways Division, the access road shall be connected to the planned long range frontage road. At that time, the direct access to the Queen Kaahumanu Highway shall be eliminated.

5. All roadways within the proposed development shall be constructed in accordance with the requirements of the Department of Public Works. Curbs, gutters, and sidewalks shall be required to be constructed in areas of likely pedestrian traffic as determined by the Chief Engineer and the Planning Director.

6. A roadway connection to the adjacent property to the north shall be provided meeting with the approval of the Department of Public Works.

7. A drainage system shall be installed meeting with the approval of the Department of Public Works.

8. All residential, commercial, and hotel units and uses shall be connected to a secondary sewage treatment plant, public or private, meeting with the approval of the appropriate governmental agencies. The secondary sewage treatment plant shall have a standby generator to operate the plant in the event of an electrical power outage.

9. An archaeological mitigation plan for archaeological site preservation and data recovery shall be approved by the Planning Department, in consultation with the Department of Land and Natural Resources – Historic Sites Section prior to any land preparation activity being conducted on the property.

10. Should any unanticipated archaeological sites be uncovered during land preparation activity, work within the affected area shall cease and the Planning Director shall be immediately notified. Work within the affected area shall not resume until clearance is obtained from the Planning Director.

11. An emergency preparedness and response plan shall be submitted to the Planning Director and the Civil Defense Agency for review and approval prior to receipt of occupancy for the first hotel.

12. An anchialine pond management plan shall be submitted to and approved by the Planning Director prior to receipt of Final Plan

Approval of any of the proposed uses or prior to conducting any land preparation activity in the affected area, whichever occurs first. The Management Plan shall be developed in consultation with the Army Corps of Engineers and the U.S. Fish and Wildlife Service. The objective of its management plan shall be to: 1) maintain the environmental integrity of the existing ponds, 2) protect and manage this resource to provide educational and interpretive opportunities to the public, 3) control and monitor construction activities so that impacts may be identified and mitigated to avoid any detrimental impacts to the pond, and 4) provide for a pond manager to implement the management plan and conduct scientific monitoring programs. The Management Plan will detail the area of ponds to be preserved, the dimensions of buffer zones surrounding the pond area, allowable activities within the pond areas, if any, and establish a pond management program.

13. Mauka-makai public access(es) shall be provided. A lateral, shoreline public access throughout the length of the property shall also be provided. Public parking shall be established near the shoreline following the ratio of one public parking stall to be provided for every ten hotel, condominium, and residential units. Restroom/shower facilities shall be provided at each mauka-makai public access. Public parking stalls and restroom/shower facilities shall be

provided concurrently with the development of the first hotel, residential subdivision, or condominium development, whichever is developed first. An easement shall be recorded with the State Bureau of Conveyances for the public access(es) and parking areas. The location, time of construction and/or availability, restrictions on uses, signage, and related improvements for the public shoreline access(es) and parking areas shall be approved by the Planning Department. In lieu of providing a mauka-makai access and facilities at either the north or south end of the property, the Planning Director may substitute a payment to the County in an amount equal to the cost of such access, parking stalls and restroom/shower facilities, which payment shall be used by the County for the establishment of a public campground in Kona. Use of the mauka-makai and shoreline public access(es) parking stalls and restroom/shower facilities shall be afforded to the public on a 24-hour basis, subject to a public access plan to be approved by the Planning Department. The use of the public access(es) and facilities after sundown shall be primarily for those persons wishing to shore-fish at night. The public access plan shall provide for adequate rules with respect to safety, health, and welfare of the public, including persons who are guests and residents on the resort. The rules may include a system of permits or passes to regulate the use of the access(es) and facilities after sundown.

14. A water quality and marine life monitoring and mitigation plan shall be developed. The plan shall be submitted to and approved by the Planning Department in consultation with the Natural Energy Laboratory of Hawaii, the Hawaii Ocean Science Technology Park, and the National Park Service prior to the issuance of a grading permit and/or prior to any land preparation activity being conducted on the golf course, hotel sites, or condominium site whichever occurs first.

15. The use of pesticides and herbicides shall conform with the applicable regulations of the appropriate governmental agencies.

16. During construction, best effort measures shall be taken to minimize the potential of both fugitive dust and runoff sedimentation. Such best effort measures shall be in compliance with construction industry standards and practices utilized during construction projects of the State of Hawaii.

17. All utility lines shall be underground.

18. No improvements shall be allowed within the 40-foot shoreline setback area unless a Shoreline Setback Variance has been applied for and granted by the Planning Commission.

19. To ensure that the goals and policies of the Recreational Element of the General Plan are implemented, the Department of Parks and Recreation, upon consultation and with the approval of the Planning Department, may require the provision of public recreational facilities and/or improvements

within the project area or the affected districts as appropriate. The preliminary recreational needs determination, if any, shall be established prior to the granting of Final Plan Approval for the proposed golf course and related improvements, and shall be based upon the estimated cost of a similar public facility and/or improvements, less any credits for existing facilities and/or improvements directly attributable to the overall project. The applicant shall provide its required pro rata share in a method not inconsistent with the requirements and criteria found in Chapter 8, Article 1 (Park Dedication Code) of the County Code prior to the opening of the proposed golf course or any related facility thereto, whichever occurs first.

20. Comply with the terms of a Settlement Agreement as presented in Mr. Roy A. Vitousek's (attorney for the applicant) letter of November 2, 1990, to Mr. Kevin Seiter (attorney representing Friends of Kohanaiki, Inc., West Hawaii Surfing Association, and Surfrider Foundation) attached herewith as Exhibit I.

21. All affected conditions imposed by the State Land Use Commission, Ordinance No. 87 52 (General Plan Amendment), and Ordinance No. 88 159 (Change of Zone) shall be complied with.

22. All other applicable laws, rules, regulations, and requirements, including those of the State Department of Health, shall be complied with.

23. An annual progress report shall be submitted to the Planning Director prior to the anniversary date of the effective date of the SMA Use Permit. The report shall address the status of the development and the compliance with the conditions of approval. This condition shall remain in effect until all of the conditions of approval have been complied with and the Planning Director acknowledges that further reports are not required.

24. The Planning Director may administratively grant an extension to the foregoing conditions subject to any of the following circumstances occurring: A) the need for an extension is the result of either unforeseen conditions or are circumstances beyond the control of the applicant, successors, or assigns; B) granting of the time extension would not be contrary to the General Plan or Zoning Code; C) granting of the time extension would not be contrary to the original reasons for the granting of the permit; and D) the time extension granted shall be for a period not to exceed the period originally granted for performance (i.e., a condition to be performed within one year may be extended for up to one additional year). Further should any of the foregoing conditions not be met or substantially complied with in a timely fashion, the Planning Director shall initiate procedures to revoke the permit.

This approval does not, however, sanction the specific plans submitted with the application as they may be

subject to change given specific code and regulatory requirements of the affected agencies.

Please feel free to contact the Planning Department if there are any questions on this matter.

Sincerely,

/s/ Fred Y. Fujimoto
Fred Y. Fujimoto
Chairman, Planning Commission

xc: Mr. Thomas Yamamoto, Nansay Hawaii, Inc.
Mr. Kevin Seiter
Mr. Jerry Rothstein
Mr. Angel Pilago
Mr. Thomas Fee
Department of Public Works
Department of Water Supply
Civil Defense
County Real Property Tax Division
State Department of Health
State Dept. of Transportation, Highways Division
Planning Office – Kona
OSP, CZM Program w/background
DLNR

No. 15460

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

PUBLIC ACCESS SHORELINE HAWAI'I, by JERRY ROTHSTEIN, its coordinator; and ANGEL PILAGO, Appellants-Appellees-Respondents, vs. HAWAI'I COUNTY PLANNING COMMISSION, by FRED Y. FUJIMOTO, in his capacity as its chairman, and NANSAY HAWAI'I, INC., a Hawai'i corporation, Appellees-Appellants-Petitioners.	CIVIL NO. 90-293K CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS HONORABLE JAMES S. BURNS WALTER M. HEEN CORRINE K.A. WATANABE JUDGES (Filed Sep. 20, 1995)

NOTICE AND JUDGMENT ON APPEAL

CERTIFICATE OF SERVICE

DENISE E. ANTOLINI
PAUL H. ACHITOFF
LEA O. HONG
223 South King Street, 4th Fl.
Honolulu, Hawai'i 96813
Telephone: (808) 599-2436

Attorneys for Appellants-Appellees-Respondents Public Access Shoreline Hawai'i and Angel Pilago

No. 15460

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

PUBLIC ACCESS SHORELINE HAWAI'I, by JERRY ROTHSTEIN, its coordinator; and ANGEL PILAGO, Appellants-Appellees-Respondents, vs. HAWAI'I COUNTY PLANNING COMMISSION, by FRED Y. FUJIMOTO, in his capacity as its chairman, and NANSAY HAWAI'I, INC., a Hawai'i corporation, Appellees-Appellants-Petitioners.	CIVIL NO. 90-293K CERTIORARI TO THE INTERMEDIATE COURT OF APPEALS HONORABLE JAMES S. BURNS WALTER M. HEEN CORRINE K.A. WATANABE JUDGES

NOTICE AND JUDGMENT ON APPEAL

TO: CHAIR OF THE HAWAI'I COUNTY PLANNING COMMISSION:

PLEASE TAKE NOTICE that the following Judgment on Appeal is entered this day by the Supreme Court of the State of Hawai'i:

Pursuant to the Opinion of the Hawai'i Supreme Court entered on August 31, 1995, the decision of the

Intermediate Court of Appeals entered on January 28, 1993 in the above-captioned case is hereby affirmed and this matter is remanded to the Hawai'i County Planning Commission for further proceedings consistent with the Supreme Court's Opinion.

Dated: Honolulu, Hawai'i, SEP 20 1995.

BY THE COURT:

K. Miyamura
Clerk

Approved:

Robert G. Klein (SEAL)
JUSTICE OF THE ABOVE-ENTITLED COURT

PUBLIC ACCESS SHORELINE HAWAI'I, et al. v. HAWAI'I COUNTY PLANNING COMMISSION, et al., SUPREME COURT NO. 15460; NOTICE AND JUDGMENT ON APPEAL

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing were duly served on this date upon the following persons via first class mail, postage prepaid, at the addresses below:

STEVEN CHRISTENSEN
JOSEPH K. KAMELAMELA
Corporation Counsel
County of Hawai'i
101 Aupuni Street
Suite 325
Hilo, Hawai'i 96720

Attorneys for Appellee-Appellant-Petitioner
Hawai'i County Planning Commission

ROY A. VITOUSEK, III
JAMES ROBERT ARNETT, II
NANI RAPOZA
Cades Schutte Fleming & Wright
B-303 Hualalai Center
75-170 Hualalai Road
Kailua-Kona, Hawai'i 96740

Attorneys for Appellee-Appellant-Petitioner
Nansay Hawai'i, Inc.

In addition, undersigned hereby certifies that one copy of the foregoing document was served upon the following *amici curiae* by first-class mail, postage prepaid, on this date to the addresses below:

KA LAHUI HAWAI'I
Mililani Trask, Kia'aina
P.O. Box 4551
Kailua-Kona, Hawai'i 96745

David B. Kaapu, Esq.
75-167E Hualalai Rd., Ste. 2
Kailua-Kona, Hawai'i 96740

Attorney for KONA HAWAIIAN CIVIC CLUB

Margery S. Bronster
Attorney General
Steven S. Michaels
Deputy Attorney General
425 Queen Street
Honolulu, Hawai'i 96813

Attorneys for STATE OF HAWAI'I

Native Hawaiian Legal Corporation
Alan T. Murakami, Esq.
Paul F.N. Lucas, Esq.
Carl C. Christensen, Esq.
1164 Bishop Street, Ste. 1205
Honolulu, Hawai'i 96813

Attorneys for PELE DEFENSE FUND

David L. Callies, Esq.
1532 Kamole Street
Honolulu, Hawai'i 96821

Orlando R. Davidson, Esq.
Gordon M. Arakaki, Esq.
700 Bishop Street, Ste. 1928
Honolulu, Hawai'i 96813

Attorneys for LAND USE RESEARCH FOUNDATION OF HAWAI'I

Sherry P. Broder, Esq.
733 Bishop Street
Suite 1800
Honolulu, Hawai'i 96813

Jon M. Van Dyke, Esq.
2515 Dole Street
Honolulu, Hawai'i 96822

Attorneys for OFFICE OF HAWAIIAN AFFAIRS

DATED: September 18, 1995, at Honolulu, Hawai'i.

/s/ Denise E. Antolini
DENISE E. ANTOLINI
PAUL H. ACHITOFF
LEA O. HONG

Attorneys for Appellants-Appellees-Respondents Public Access Shoreline Hawai'i and Angel Pilago

ALL PASH TESTIMONY ON RECORD RELATIVE TO ALLEGED GATHERING RIGHTS

PASH Testimony and evidence with respect to alleged native Hawaiian gathering rights:

> Traditional rights of Native Hawaiian families to engage in utilizing and maintaining anchialine ponds at Kohanaiki may be interrupted or denied. Maintaining and harvesting the ponds for Opae Ulu and Opae Lolo is necessary to continue traditional fishing and food gathering practices. We need to address this issue to assure that these traditional native Hawaiian people and their fishing and food gathering rights are not denied.

Rothstein Letter to Planning Commission dated 11/8/90 (R. at 184).

> Another issue, a very important one, is the native Hawaiian fishing and food gathering rights, of which our members are directly impacted. . . . Okay that's an impact, the traditional gathering rights which are going to be harvesting, maintaining from those ponds, which our members have engaged in, their families for decades.

Testimony of Jerry Rothstein, November 8, 1990 (R. at 1156).

> PASH has members who are regular users of the area for surfing, fishing, running, beach going, pond maintenance and harvesting, and diving. Their interests need to be protected.

Testimony of Jerry Rothstein, November 8, 1990 (R. at 1154).

> But I'd like to point out where I said some of our members are and may be specifically harmed by the proposed action. And that is one of our members and his family, and other families that we know who aren't our members, use those ponds for, as I pointed out, harvesting and maintenance.

Testimony of Jerry Rothstein, November 8, 1990 (R. at 1170).

NO. 15460

IN THE SUPREME COURT OF THE
STATE OF HAWAII

PUBLIC ACCESS SHORELINE HAWAII, by JERRY ROTHSTEIN, its coordinator; and ANGEL PILAGO, Respondents-Appellants-Appellees, vs. HAWAII COUNTY PLANNING COMMISSION, by FRED Y. FUJIMOTO in his capacity as its chairman, Petitioner-Appellee-Appellant, and NANSAY HAWAII, INC., a Hawaii corporation, Petitioner-Appellee-Appellant.	CIVIL NO. 90-293K APPEALS FROM FINDING OF FACT, CONCLUSIONS OF LAW, AND ORDER FILED HEREIN ON JUNE 7, 1991 THIRD CIRCUIT COURT HONORABLE RONALD IBARRA JUDGE (Filed Feb. 8, 1993)

APPLICATION FOR WRIT OF CERTIORARI
INTERMEDIATE COURT OF APPEALS OPINION
DATED JANUARY 28, 1993 (APPENDIX I)
CERTIFICATE OF SERVICE

CADES SCHUTTE FLEMING & WRIGHT
ROY A. VITOUSEK III
J. ROBERT ARNETT, II
NANI RAPOZA
B-303 Hualalai Center
75-170 Hualalai Road
Kailua-Kona, Hawaii 96740
Telephone No. (808) 329-5811
Attorneys for Petitioner-Appellee-Appellant
NANSAY HAWAII, INC., a Hawaii Corporation

* * *

If these customary and traditional rights are public rights, they are not clearly distinguishable from the general public interests and no contested case hearing request should be allowed. If these are rights available only to persons of a certain ethnicity, then issues of equal protection arise, as do issues of whether Mr. ROTHSTEIN and PASH adequately represent the interests of this group. See *Lujan v. National Wildlife Foundation*, 497 U.S. ___, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990).

D. COMMISSION DID NOT DISREGARD ALLEGED GATHERING RIGHT

The Opinion of the Intermediate Court of Appeals concluded that the Petitioner-Appellee-Appellant HAWAII COUNTY PLANNING COMMISSION disregarded the gathering rights of native Hawaiians. This is

an incorrect statement. The Commission heard testimony for two days then required that all existing anchialine ponds be preserved and maintained, that public access be provided and that a pond management plan be developed in consultation with the Army Corp of Engineers and the U. S. Fish and Wildlife Service and approved by the Planning Director. See Slip Op. pp. 13-14.

Respondents-Appellants-Appellees PASH and PILAGO *did not challenge the merits of the Commission's decision or the terms and conditions of the SMAP.* The SMAP itself and the conditions demonstrate that steps were taken to preserve the ponds and to manage them in a *scientific,* environmentally appropriate manner. PASH has not alleged that these conditions failed to protect and preserve the alleged interests of their unspecified members.

E. GATHERING RIGHTS CANNOT PREVENT DEVELOPMENT

The Intermediate Court of Appeals erred in requiring the Planning Commission to explore preservation and protection of alleged gathering rights as a pre-condition to permitting an owner to develop land.

As stated in *Kalipi v. Hawaiian Trust Co.,*

> These rights are right of access and collection. They do not include any inherent interest in the natural objects themselves until they are reduced to the gathering [gatherer's] possession. As such those asserting the rights cannot prevent the diminution or destruction of those things they seek. The rights therefore do not

prevent owners from developing lands. 66 Haw. at 8, n.2.

In *Pele Defense Fund* this Court stated that "*Kalipi* rights only granted access to undeveloped land, under the specified circumstances, but they do not ensure that any particular land will be held for the exercise of native Hawaiian customs." 73 Haw. 578, 621 837 P.2d 1247, 1272, n.36.

The Opinion of the Intermediate Court of Appeals is inconsistent with this Court's statements in *Kalipi* and *Pele Defense Fund.*

F. TAKING

Petitioner-Appellee-Appellant NANSAY HAWAII, INC. is the owner, in fee simple, of the Kohanaiki property which was the subject of the SMAP. One important right in the bundle of legal rights conferred upon property owners is the right to exclude others from their property. If government takes away this right, the property owner may be entitled to compensation pursuant to the State and Federal Constitutional protections against taking or damaging private property for public use without just compensation. See Hawaii Constitution, Article I, Section 20.

Intermediate Court of Appeals concluded that certain ill-defined gathering rights exist and that Petitioner-Appellee-Appellant NANSAY HAWAII, INC. may not proceed with development of the property until the Commission evaluates its "obligation to preserve and protect native Hawaiian rights." Slip Op. p.12. The Court cited

the Hawaii Constitution, Article XII, Sec. 7 as the source of those rights and that obligation.

Where, as here, rights claimed are not show [sic] to be of ancient origin, i.e., not an Hawaiian usage which predates November 25, 1892 (see *Zimring v. State*, 521 Haw. 472, 474, 479 P.2d 202, 204 (1970)) but are *created* by 1978 amendments to the Hawaii Constitution; then at least a partial taking may have occurred. The Constitution, or the Court, may have granted a license to an ill-defined class of people (or all people) to come onto private property and take things and to have automatic standing to challenge any proposed development of the property. This cannot help but diminish the property rights of the fee owner. See *Nollan v. California Coastal Commission*, 482 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), and *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992).

V. CONCLUSION

Based on the foregoing, it is respectfully requested that this Supreme Court issue a Writ of Certiorari to review the

* * *

NO. 15460

IN THE SUPREME COURT OF THE STATE OF HAWAII

PUBLIC ACCESS SHORELINE HAWAII, by JERRY ROTHSTEIN, its coordinator; and ANGEL PILAGO, Respondents-Appellants-Appellees, vs. HAWAII COUNTY PLANNING COMMISSION, by FRED Y. FUJIMOTO in his capacity as its chairman, Petitioner-Appellee-Appellant, and NANSAY HAWAII, INC., a Hawaii corporation, Petitioner-Appellee-Appellant.	CIVIL NO. 90-293K APPEALS FROM FINDING OF FACT, CONCLUSIONS OF LAW, AND ORDER FILED HEREIN ON JUNE 7, 1991 THIRD CIRCUIT COURT HONORABLE RONALD IBARRA JUDGE (Filed June 7, 1993)

SUPPLEMENTAL BRIEF OF
PETITIONER-APPELLEE-APPELLANT
NANSAY HAWAII, INC.

APPENDICES

CERTIFICATE OF SERVICE

CADES SCHUTTE FLEMING & WRIGHT
ROY A. VITOUSEK III
J. ROBERT ARNETT, II
NANI RAPOZA
B-303 Hualallai Center
75-170 Hualalai Road
Kailua-Kona, Hawaii 96740
Telephone No. (808) 329-5811
Attorneys for Petitioner-Appellee-Appellant
NANSAY HAWAII, INC.

* * *

the condition that all anchialine ponds and public access to and along the shoreline be preserved.

Third, the ICA's holding that a landowner will not be allowed to develop undeveloped land unless and until effort is made to preserve and protect any native Hawaiian gathering rights, *PASH v. Hawaii County Planning Commission*, Slip Op. at 13, is inconsistent with, or an unwarranted extension of, *Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 656 P.2d 745 (1982) and *Pele Defense Fund v. Paty, supra.*

Fourth, the opinion of the ICA raises a significant constitutional issue. By extending native Hawaiian gathering rights beyond all previously recognized limits, the ICA created a right to enter and take shrimp from Nansay's property in violation of the Fifth and Fourteenth Amendments.

IV. ARGUMENT

A. PASH FAILED TO ESTABLISH A PRIMA FACIE CLAIM OF NATIVE HAWAIIAN GATHERING RIGHTS

The evidence presented by PASH's representatives with respect to native Hawaiian gathering rights is set out in Appendix G. Marcel Keanaaina and Malani Pai also offered testimony with respect to harvesting opae (shrimp) from anchialine ponds but their testimony was insufficient to establish ancient gathering rights. Further, there is nothing in the record before the Commission which connected them or their interests to any member of PASH.

Under *Kalipi* and *Pele Defense Fund*, persons claiming rights protected by article XII, § 7 of the Hawaii State Constitution must show:

1) He or she is a native Hawaiian. Article XII, § 7; *Pele Defense Fund*, 73 Haw. at 44 n. 34, 837 P.2d at 1272 n.34;

2) The rights claimed were exercised by *ancient* Hawaiians. *Kalipi*, 66 Haw. at 10, 656 P.2d at 751; *Proceedings*, at 640; *Pele Defense Fund*, 73 Haw. at 619, 837 P.2d at 1271;

3) The right has been *continuously* exercised. *Kalipi*, 66 Haw. at 11 n.5, 656 P.2d at 751 n.5; *Pele Defense Fund*, 73 Haw. at 619, 837 P.2d at 1271; and

* * *

no right to prevent owners from developing land, then such rights do not include a legally protected interest in

ensuring that lands will be held for exercise of these rights. Thus, these rights provide no legal foundation for an agency to require that particular lands be held undeveloped for exercise of gathering rights or to condition development approval upon an agreement to allow gathering on developed land.

Further, if the persons claiming gathering rights have no substantive right to prevent or condition development, then their interests should be legally insufficient to confer the procedural right to demand a contested case hearing.

D. THE ICA'S OPINION EFFECTS AN UNCONSTITUTIONAL TAKING OF PRIVATE PROPERTY

The ICA's opinion violates the takings clause[2] of the Fifth Amendment of the United States Constitution, made applicable to the States by the Fourteenth Amendment, by extending the holdings of *Kalipi* and *Pele Defense Fund* to transfer Nansay's property rights to PASH and anyone else who may claim such rights.

In *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987), the Supreme Court held that requiring a landowner to grant a public easement across his property as a condition of obtaining a permit to build a house effected a taking of property

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[2] No person shall . . . be deprived of . . . property, without due process of law, nor shall private property be taken for public use, without just compensation. U.S. Const., 5th Amend.

without just compensation in violation of the Fifth Amendment. The Court recognized that the right to exclude others is one of the most essential elements of property ownership. 483 U.S. at 831, 97 L.Ed.2d at 686. The Court further characterized the easement, where individuals are given a permanent and continuous right to pass to and fro, as a "permanent physical occupation" for which it has uniformly found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner. 483 U.S. at 831-32, 97 L.Ed.2d at 686.

The distinction between "physical occupation" takings and "regulatory" takings is significant. The Supreme Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), made clear that a physical occupation is a taking without regard to other factors a court might ordinarily examine. 458 U.S. at 432, 73 L.Ed.2d at 880. Incidents of physical occupation are takings even if they occupy only relatively insubstantial amounts of space and do not seriously interfere with the landowner's use of the rest of his land. 458 U.S. at 430, 73 L.Ed.2d at 878.

In *Kaiser Aetna v. United States*, 444 U.S. 164, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979), the Supreme Court held that the government's attempt to create a public right of access to a marina as a navigational servitude amounted to a taking requiring just compensation under the Fifth Amendment. 444 U.S. at 178-79, 62 L.Ed.2d at 345. The Court held that the "right to exclude," so universally held to be a fundamental right, falls within the category of

interests the government cannot take without compensation. 444 U.S. at 179-80, 62 L.Ed.2d at 346. The Court stated that the imposition of a navigational servitude would result in an actual physical invasion of the marina, and reaffirmed the rule that even if the government invades only an easement in property it must nonetheless pay just compensation. 444 U.S. at 180, 62 L.Ed.2d at 346.

In this case, the ICA has conveyed to PASH an interest in Nansay's property similar to a profit a prendre – the right to enter the property of another and to remove products of the soil. 25 Am.Jur.2d Easements and Licenses § 4 at 419 (1966). This right is a more extensive occupation of property than either the easement in *Nollan* or the servitude in *Kaiser Aetna* and is clearly a "permanent physical occupation," and thus a *per se* taking of property.

The ICA's opinion creates new rights and goes beyond recognizing pre-existing rights. This is clear from an examination of possible sources for such rights and the evidence upon which the ICA relied. The three possible sources cited by the ICA for these rights were article XII, § 7 of the Hawaii Constitution, HRS § 1-1, and HRS § 7-1.

Article XII, § 7, adopted in 1978, by its own terms does not purport to create any new rights. Instead, it "reaffirms" the State's obligation to protect certain rights possessed by ahupua'a tenants. The proceedings of the 1978 constitutional convention make clear that no new rights were being created. See *Proceedings, supra,* at 436. Furthermore, if article XII, § 7 created the rights at issue here, such creation would itself violate the takings clause.

HRS § 1-1 cannot be the source of such rights. This statute was enacted in 1892 as part of an act to reorganize the judiciary department, and adopted the common law of England as the common law of the Hawaiian Islands. The legislature was cognizant of the fact that before such enactment, the courts of Hawaii had not adopted the common law of England *in toto* and consequently made certain qualifications. Accordingly, it was deemed necessary to provide for exceptions. *De Freitas v. Trustees of the Campbell Estate*, 46 Haw. 425, 430, 380 P.2d 762 (1963).

Thus, the statute originally provided that the common law of England was the common law of Hawaii "except as otherwise expressly provided by the Hawaiian Constitution or laws, or fixed by Hawaiian judicial precedent, or established by Hawaiian national usage." L. 1892, ch. 57, § 5, at 91. The statute did not create any new rights, but merely provided that those exceptions to English common law which had been established by Hawaiian national usage would continue to be recognized.

Claims to private property interests based on "Hawaiian usage" must have been established before November 25, 1892, the date the statute was approved. *State v. Zimring*, 52 Haw. 472, 474-75, 479 P.2d 202 (1970). Moreover, such usage must be established by substantial evidence. *State v. Zimring*, 58 Haw. 106,118, 566 P.2d 725 (1977). Generally, Hawaiian usage is found where it has been recognized by the court to some extent, although it may not have been the subject of actual judicial decision. *Henrique v. Paris*, 10 Haw. 408, 413-14 (1896); *Brown v. Spreckels*, 18 Haw. 91, 96, (1906) *aff'd*, 212 U.S. 208.

Therefore, HRS § 1-1 did not create any new rights based upon Hawaiian usage, but merely preserved those which had already been established and which were contrary to English common law. Furthermore, due to the historical developments regarding land tenure, any such usages must have existed prior to 1846.

Prior to 1846, the King owned all the land, which he divided among his chiefs, who in turn subdivided it and assigned it to tenants. The tenant was bound to labor a certain number of days for the immediate lord of the land, and also for the King or government, and to pay taxes both for the use of the land and for the enjoyment of the other rights and privileges and appurtenants thereto. *Fundamental Law of Hawaii*, at 140 (1904); *Oni v. Meek*, 2 Haw. App. 87, 90 (1858). In 1846, the Board of Land Commissioners was established for the purpose of effecting a division of rights in land and quieting titles throughout the Kingdom. *Estate of His Majesty Kamehameha IV*, 2 Haw. 715, 721 (1864); *Fundamental Law of Hawaii*, at 137-40 (1904). The Land Commission's purpose was to award titles in fee simple and abolish what then remained of the Hawaiian feudal system. *Rooke v. Queen's Hospital*, 12 Haw. 375, 391 (1900).

HRS § 7-1 was enacted on August 6, 1850, to preserve the rights of tenants to take certain items from the land on which they lived notwithstanding that their landlords had obtained fee simple title to the land. It was the intention of the legislature to declare in this statute *all* the specific rights of the hoa'aina, excepting fishing rights, which should be held to prevail against the fee simple title of the konohiki. *Oni v. Meek*, 2 Haw. 87, 95 (1858). The Court held in *Oni* that the intent of the legislature in

passing the statute was that the former right of the hoa'aina to pasture his animals on the land of the konohiki should cease. *Id.* The Court held that the enumeration of specific rights of the hoa'aina was restrictive as against the rights of the konohiki and the government and that the maxim *expressio unius est exclusio alterius* ("the expression of one thing is the exclusion of another") must be held to apply with conclusive force. *Id.*, at 95-96.

The land division was commenced in 1846 because it was obvious that the resources of the country could not be developed until the system of undivided and undefined ownership in land should be abolished. *Estate of His Majesty Kamehameha IV*, 2 Haw. 715, 721 (1864). No evidence exists to support the notion that additional property rights were created under the category of "Hawaiian usage" after 1846, which would have been contrary to the purpose of the land division itself. Therefore, if such a right existed, it must be shown to have existed prior to 1846.

The ICA in this case gives effect to a property right never acknowledged before. The gathering rights it extends to PASH are not limited by tenancy in a particular ahupua'a, to native Hawaiians, to rights existing before 1846 or 1892, or to rights that have been continuously exercised. The ICA gives effect to such rights in derogation of Nansay's property rights, essentially granting PASH a profit a prendre to enter Nansay's property and collect shrimp. That constitutes a taking of property without just compensation in violation of the Fifth Amendment and cannot be sustained.

V. CONCLUSION

For all the foregoing reasons, Nansay respectfully requests that this Court affirm the decisions of the Commission in denying PASH contested case procedures and in granting Nansay's SMAP.

DATED: Honolulu, Hawaii, June 7, 1993.

/s/ Roy A. Vitousek III
ROY A. VITOUSEK III
J. ROBERT ARNETT, II
NANI RAPOZA
Attorneys for Petitioner-Appellee-Appellant NANSAY HAWAII, INC.

NO. 15460

IN THE SUPREME COURT OF THE STATE OF HAWAII

PUBLIC ACCESS SHORELINE HAWAII, by JERRY ROTHSTEIN, its coordinator; and ANGEL PILAGO, Respondents-Appellants-Appellees, vs. HAWAII COUNTY PLANNING COMMISSION, by FRED Y. FUJIMOTO in his capacity as its chairman, Petitioner-Appellee-Appellant, and NANSAY HAWAII, INC., a Hawaii corporation, Petitioner-Appellee-Appellant.	CIVIL NO. 90-293K APPEALS FROM FINDING OF FACT, CONCLUSIONS OF LAW, AND ORDER FILED HEREIN ON JUNE 7, 1991 THIRD CIRCUIT COURT HONORABLE RONALD IBARRA JUDGE (Filed Aug. 27, 1993)

SECOND SUPPLEMENTAL BRIEF (OPENING BRIEF) OF PETITIONER-APPELLEE-APPELLANT NANSAY HAWAII, INC.

STATEMENT OF RELATED CASES

APPENDICES

CERTIFICATE OF SERVICE

CADES SCHUTTE FLEMING & WRIGHT
ROY A. VITOUSEK III
J. ROBERT ARNETT, II
NANI RAPOZA
B-303 Hualalai Center
75-170 Hualalai Road
Kailua-Kona, Hawaii 96740
Telephone No. (808) 329-5811
Attorneys for Petitioner-Appellee-Appellant
NANSAY HAWAII, INC.

* * *

In evaluating the harms, what harm does the continuation of the native practice or tradition cause to the resource it utilizes? In the case of taking opae from anchialine ponds, does the continuation of that practice disrupt the ponds' ecosystem? HRS § 205A-2(b)(4). Does the practice threaten a valuable coastal ecosystem of significant biological or economic importance? HRS § 205A-2(c)(4)(B). Does the practice disrupt or degrade a coastal water ecosystem? HRS § 205A-2(c)(4)(C). Does the practice threaten water quality? HRS § 205A-2(c)(4)(D).

Moreover, the harm to the property owner must be evaluated. The harm of taking the owner's property without paying just compensation is addressed *infra*. In addition, this Court should consider the harm to the property owner that could result from its decision as to the procedures to be utilized in considering these criteria. Although seemingly lost from view in the current stage of this proceeding, the central issue here is whether the Commission clearly erred in denying PASH contested case procedures. The ICA has recognized the burdens and delay caused by "protracted" contested case hearings in *Medeiros v. Hawaii County Planning Commission*, 8 Haw. App. 183, 196, 797 P.2d 59 (1990). The delay and expense inherent in such procedures may render development financially infeasible in many cases. "Native Hawaiian rights" which substantively have no ability to preclude development should not be able to preclude development by procedural "rights" granted to them.

C. THE DECLARATION OF EXPANDED NATIVE HAWAIIAN GATHERING RIGHTS BY THE ICA, IF ALLOWED TO STAND, WOULD CONSTITUTE A TAKING AND ANY RECOGNITION OR ENFORCEMENT OF SUCH RIGHTS BY THE COMMISSION WOULD CAUSE SUCH TAKING TO BECOME RIPE FOR PURPOSES OF FEDERAL JUDICIAL SCRUTINY

The question of at what point the "protection" of native Hawaiian rights in land being developed would implicate the takings clause is a curious one given the procedural posture of this case. Here, the permitting authority and the permittee agree on the issuance of the

SMAP and the conditions attached to it. Moreover, PASH does not object to any of the conditions of the SMAP, and asserted before the Commission that it was not opposed to development of Nansay's property per se. Thus, there is no question of a regulatory taking presented by the facts of this case. *See Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 120 L.Ed.2d 798, 813-15 (1992); *Nollan v. California Coastal Commission*, 483 U.S. 825, 834-37, 107 S.Ct. 3141, 97 L.Ed.2d 677, 687-90 (1987).

The violation of the "takings clause" of the Fifth Amendment applied to the States by the Fourteenth Amendment is complete in the opinion of the ICA if affirmed by this Court. As the Supreme Court recognized in *Lucas*,

> [I]f the protection against physical appropriations of private property was to be meaningfully enforced, the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits.

120 L.Ed.2d at 812, citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414-15, 43 S.Ct. 158, 67 L.Ed. 322 (1922).

The ICA has redefined "native Hawaiian rights" and correspondingly redefined the bundle of rights held by Nansay in Kohanaiki to Nansay's considerable detriment. The asserted native Hawaiian right gives its possessor a right of access to Nansay's private property, and correspondingly vitiates Nansay's right to exclude. The right also gives its possessor the right to take items from Nansay's property, items which, in the absence of the right, would undisputedly be Nansay's private property. In this way native Hawaiian gathering rights are similar

to the common law profit a prendre – the right to enter the property of another and to remove products of the soil. See, e.g., 25 Am.Jur.2d *Easements and Licenses* § 4 at 419 (1966).

The importance of the property owner's right to exclude others from the property cannot be overstated. It is a fundamental aspect of property, and universally held to be a fundamental right. *Nollan v. California Coastal Commission*, 483 U.S. 825, 832, 107 S.Ct. 3141, 97 L.Ed.2d 677, 685-86 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80, 100 S.Ct. 383, 62 L.Ed.2d 332, 346 (1979); *Int'l News Serv. v. Assoc. Press*, 248 U.S. 215, 250, 39 S.Ct. 68, 63 L.Ed. 211 (1918) (Brandeis, J., dissenting); *Nixon v. United States*, 978 F.2d 1269, 1285 (D.C. Cir. 1992); *Sintra, Inc. v. City of Seattle*, 829 P.2d 765, 771 (Wash. 1992), *cert. den'd*, 113 S.Ct. 676, 121 L.Ed.2d 598; *Clanton v. Hathorn*, 600 So.2d 963, 965 (Miss. 1992).

Depriving the property owner of its right to exclude others is taking private property. If just compensation is not paid, such action is a violation of the Fourteenth Amendment. Thus, in *Nollan*, the Supreme Court held that requiring a landowner to grant a public easement across his property effected an unconstitutional taking. 483 U.S. at 831, 97 L.Ed.2d at 685.

> We think a "permanent physical occupation" has occurred, for purposes of [the rule that a permanent physical occupation is uniformly found a taking without regard to whether the action achieves an important public benefit or has only minimal economic impact on the

> owner], where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.

483 U.S. at 831-32, 97 L.Ed.2d at 686.

In *Kaiser Aetna*, the Supreme Court held that the government's attempt to create a public right of access to a marina amounted to an unconstitutional taking. 444 U.S. at 178-79, 62 L.Ed.2d at 345. The Ninth Circuit held that government's attempt to require public access to a lagoon, "goes too far; such a requirement may be imposed only by paying compensation under the fifth amendment." *Boone v. United States*, 944 F.2d 1489, 1502 (9th Cir. 1991). In *Evers v. County of Custer*, 745 F.2d 1196 (9th Cir. 1984), the Ninth Circuit held that a county declaration of intention to construct a road over landowner's property amounted to an unconstitutional taking.

> The County did everything it could, short of actually tearing down the gates, to open the road to members of the public, and officially endorsed their use of the road. *A property owner's right to exclude others is "univerisally held to be a fundamental element of the property right."*

745 F.2d at 1201 (emphasis added).

The fact that at this point a court instead of an agency has imposed what amounts to an easement on Nansay's property does not remove the unconstitutional character of the taking. Such a taking may not be ripe for adjudication in the federal courts until the easement or profit a

prendre taken is finally adjudicated by a state trial court or an agency attempts to enforce such rights. However, any recognition or enforcement of native Hawaiian rights under the ICA's definition will ripen the taking into one cognizable in federal courts.

> If compensation for private property taken for public use is an essential element of due process of law as ordained by the 14th Amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the state within the meaning of that Amendment.

Chicago, Burlington & Quincy R. R. Co. v. Chicago, 166 U.S. 226, 235, 17 S.Ct. 581, 41 L.Ed. 979, 984 (1897). Thus, the Supreme Court holds that the prohibitions of the Fourteenth Amendment refer to all the instrumentalities of the state, to its legislature, executive, and judicial authorities. *Id.*

> In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the state or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the 14th Amendment of the Constitution of the United States, and affirmance of such judgment by the highest court of the state is a denial by that state of a right secured to the owner by that instrument.

Id. More recently, the Court reversed the Supreme Court of Washington's decision that the state's constitution denied owners of oceanfront property any further rights

in future accretions to their land. *Hughes v. State of Washington*, 389 U.S. 290, 88 S.Ct. 438, 19 L.Ed.2d 530 (1967). Justice Stewart in his concurring opinion concluded that the State Supreme Court had effected an unforeseeable change in Washington property law.

> There can be little doubt about the impact of that change upon Mrs. Hughes: The beach she had every reason to regard as hers was declared by the state court to be in the public domain. Of course the court did not conceive of this action as a taking. As is so often the case when a State exercises its power to make law, or to regulate, or to pursue a public project, pre-existing property interests were impaired here without any calculated decision to deprive anyone of what he once owned. But the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*. Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property – without paying for the privilege of doing so. Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate, I join in reversing the judgment.

389 U.S. at 297-98, 19 L.Ed.2d at 536. Several years later, the Court cited the above language with approval in the majority opinion in *Bonelli Cattle Company v. State of Arizona*, 414 U.S. 313, 331, 94 S.Ct. 517, 38 L.Ed.2d 526, 542 (1973), *overruled on other grounds, Oregon v. Corvalis Sand*

and Gravel Co., 429 U.S. 363, 97 S.Ct. 582, 50 L.Ed.2d 550 (1977).

This situation is somewhat similar to the Kauai water rights litigation, to which the State of Hawaii has referred in its motion to intervene. The district court in *Robinson v. Ariyoshi*, 441 F.Supp. 559 (D. Haw. 1977), held that the Supreme Court of Hawaii in *McBryde Sugar Company v. Robinson*, 54 Haw. 174, 504 P.2d 1330 (1973), had taken vested property rights in violation of the Fourteenth Amendment by sua sponte overruling over 100 years of precedents and effecting an unforeseeable change in Hawaii's water rights laws. 441 F.Supp. at 585. The Ninth Circuit agreed that while the Hawaii Supreme Court was acting within its power in effecting a change in the State's water law, the property owners could not be divested of their rights without just compensation. *Robinson v. Ariyoshi*, 753 F.2d 1468, 1474 (9th Cir. 1985).

The Supreme Court vacated and remanded for reconsideration in light of the federal ripeness doctrine expounded in *Williamson County Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). *Robinson v. Ariyoshi*, 477 U.S. 902, 106 S.Ct. 3269, 91 L.Ed.2d 560 (1986). After remand to the district court, the Ninth Circuit concluded that because the new law declared in *McBryde* had not been placed directly in issue before the Hawaii trial court and because the State had not interfered in any way with the parties' use or diversion of water, the case did not pose a ripe controversy. *Robinson v. Ariyoshi*, 887 F.2d 215, 218-19 (9th Cir. 1989).

Similarly, in *Sotomura v. County of Hawaii*, 460 F.Supp. 473 (D. Haw. 1978), the district court concluded that the

Hawaii Supreme Court's decision in *County of Hawaii v. Sotomura*, 55 Haw. 176, 517 P.2d 57 (1973), in which it sua sponte decreed that all property seaward of the vegetation line belonged to the public, constituted a taking of the owners' property without just compensation in violation of the Fourteenth Amendment. 460 F.Supp. at 483. The district court found the Hawaii Supreme Court's decision was contrary to established practice, history and precedent, and apparently intended to implement the Court's conclusion that public policy favors extension of public use and ownership of the shoreline.

> A desire to promote public policy, however, does not constitute justification for a state taking private property without compensation. The Fourteenth Amendment to the Constitution forbids it.

460 F.Supp. at 481.

Thus, the extent to which the ICA's decision is a departure from previous law becomes crucial to the takings question. The Supreme Court in *Lucas*, discussed the matter from a slightly different perspective,

> Where "permanent physical occupation" of land is concerned, we have refused to allow the government to decree it anew (without compensation), no matter how weighty the asserted "public interests" involved, Loretto v. Teleprompter Manhattan CATV Corp., 458 US, at 426, 73 L Ed 2d 868, 102 S Ct 3164 – though we assuredly *would* permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title. . . . We

> believe similar treatment must be accorded confiscatory regulations, i.e., regulations that prohibit all economically beneficial use of land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts – by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise.

Lucas, 120 L.Ed.2d at 821.

The question of whether the Commission can lawfully "protect" or "recognize" the new rights declared by the ICA must be answered by inquiring whether before the ICA's decision PASH could have enforced such rights under the background principles of Hawaii land law. The answer is clearly that PASH could not have compelled Nansay to permit its members to enter the property and collect shrimp because no such right existed.

The most radical departure from existing law was the ICA's abrogation of any requirement that the holder of claimed gathering rights be a tenant or occupant of the ahupua'a. As we have seen, under ancient Hawaiian land tenure, the right to live on and use a particular parcel of land was granted by a chief to his followers who in turn paid taxes to and provided labor for the chief. These land rights were revocable at will and terminated upon the

tenant leaving the land or reverted upon the tenant's death. The notion that under such a system, other rights existed, held by people with no connection to the land and therefore not under the chief's control and without any reciprocal obligations to the chief, simply cannot be accepted. The further notion that such rights, in contradistinction to all other land rights, were irrevocable and survived the death of the ancient holders and nonusage over many years is even more farfetched.

Furthermore, the claim that such rights, even if they existed under ancient Hawaiian land tenure, survived the conversion to fee simple titles when every statute, land commission award, patent, grant, and case on the subject at the time limited rights preserved to those of "tenants" or holders of "kuleanas," is not credible.

Moreover, it is very clear that even legitimate holders of native Hawaiian rights had no ability to prevent an owner from developing his land or to force the preservation of lands for exercise of the rights under *Kalipi* and *PDF*. Thus, granting claimants of such rights "standing" to oppose Nansay's SMAP or to seek conditions to preserve such rights would be expanding their rights, and correspondingly diminishing Nansay's rights, in a manner inconsistent with the takings clause, unless just compensation is paid.

To the extent the Court seeks advance analysis of a regulatory taking issue, the rule stated in *Lucas* is that the Fifth Amendment is violated when land use regulation does not substantially advance legitimate state interests

or denies an owner economically viable use of his land.[8] 120 L.Ed.2d at 813. The first prong of the rule was applied in *Nollan*, where the Court found that the condition that the landowner grant a lateral access easement across his property in order to obtain a building permit failed to further the end advanced as justification for the prohibition on building, and was therefore unconstitutional. 483 U.S. at 837, 97 L.Ed.2d at 689.

In this case, the statutory justification for prohibiting development in the SMA is to preserve and protect coastal resources. The Commission has done that in this case. A further requirement that a specified group be given access adds nothing to the preservation and protection of the coastal resource – the anchialine ponds. In fact, requiring such access may have a negative effect on that resource. Therefore, enforcing or "recognizing" native Hawaiian rights as defined by the ICA would utterly fail to further the end advanced as justification for prohibiting development under the CZMA. The purpose of enforcing such rights becomes,

> the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of "legitimate state interests" in the takings and land-use context, this is not one of them. In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not

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[8] Whether a future act by the Commission would deny Nansay economically viable use of Kohanaiki requires a fact intensive analysis not possible without such facts.

a valid regulation of land use but "an out-and-out plan of extortion."

Nollan, 483 U.S. at 837, 97 L.Ed.2d at 689.

In summary, this Court has the power to order the Commission to recognize and enforce the new native Hawaiian rights declared by the ICA. However, if the Court does so and the Commission complies, the constitution commands that just compensation be paid.

VII. CONCLUSION

For all the foregoing reasons, Nansay respectfully requests that this Court affirm the decisions of the Commission and vacate the opinion of the ICA.

DATED: Honolulu, Hawaii, August 27, 1993.

/s/ John P. Powell for
ROY A. VITOUSEK, III
J. ROBERT ARNETT, II
NANI RAPOZA
Attorneys for Petitioner-Appellee-Appellant NANSAY HAWAII, INC.

NO. 15460

IN THE SUPREME COURT OF THE STATE OF HAWAII

PUBLIC ACCESS SHORELINE HAWAII, by JERRY ROTHSTEIN, its coordinator; and ANGEL PILAGO, Respondents-Appellants-Appellees, vs. HAWAII COUNTY PLANNING COMMISSION, by FRED Y. FUJIMOTO in his capacity as its chairman, Petitioner-Appellee-Appellant, and NANSAY HAWAII, INC., a Hawaii corporation, Petitioner-Appellee-Appellant.	CIVIL NO. 90-293K APPEALS FROM FINDING OF FACT, CONCLUSIONS OF LAW, AND ORDER FILED HEREIN ON JUNE 7, 1991 THIRD CIRCUIT COURT HONORABLE RONALD IBARRA JUDGE (Filed Oct. 20, 1995)

THIRD SUPPLEMENTAL BRIEF (REPLY BRIEF)
OF PETITIONER-APPELLEE-APPELLANT
NANSAY HAWAII, INC.

CERTIFICATE OF SERVICE

CADES SCHUTTE FLEMING & WRIGHT
ROY A. VITOUSEK III
J. ROBERT ARNETT, II
NANI LEE
B-303 Hualalai Center
75-170 Hualalai Road
Kailua-Kona, Hawaii 96740
Telephone No. (808) 329-5811
Attorneys for Petitioner-Appellee-Appellant
NANSAY HAWAII, INC.

* * *

The State's position here, moreover, is completely inconsistent [with] the attorney general's argument before the Court in *Greenwell v. Board of Education*, No. 16008 (argued July 31, 1993), that this Court has subject matter jurisdiction to review agency decisions only where contested case procedures are *required* by constitution or statute. The State's position here is not only grossly inconsistent with other cases, but also inconsistent with previous State actions in this case. While fulminating about "inherently inefficient" private decision-making the attorney general's office loses sight of the fact that the State Land Use Commission *approved* reclassification of the 450-acre resort site into the urban district in January 1987. (R. at 1002).

C. THE ATTEMPTS TO EXPLAIN AWAY THE CONSTITUTIONAL INVALIDITY OF THE ICA'S OPINION FALL SHORT

The State suggests that Nansay "waived" its constitutional rights by not raising the takings issue before the circuit court or the ICA. This argument ignores the chronology of this case. The act that constitutes a taking of Nansay's property is the ICA's opinion entered January 28, 1993, wherein the ICA created the right of non-tenants to physically invade Nansay's property. Prior to that opinion, the constitutional issue now raised did not exist.

Nansay was the prevailing party before the Commission and was defending the Commission's decisions before the circuit court. Those decisions did not purport to take Nansay's property or to invent gathering rights for non-tenants. No issue of constitutional deprivation existed then.

Although the circuit court reversed the Commission's decisions, it did not purport to invent gathering rights for non-tenants. The circuit court merely made factual findings totally unsupported by evidence on the record and applied the wrong legal standard to the issue before it. Again, no issue of constitutional deprivation existed then.

The constitutional issue was not raised until two months after briefing and oral argument were completed in July, 1992. The issues regarding expanding rights under *Kalipi v. Hawaiian Trust Company*, 66 Haw. 1, 656 P.2d 745 (1982) or inventing new rights for non-tenants did not exist until this Court's opinion in *Pele Defense Fund v. Paty*, 73 Haw. 578, 837 P.2d 1247 (1992), decided September 28, 1992, and the ICA's opinion in this case

four months later. Nansay cannot have waived its objection to a constitutional deprivation that had not occurred and was not even threatened at the time.

The other arguments on the constitutional issue raised by PASH and *amici* simply confuse or ignore doctrines established by the United States Supreme Court. First, PASH is simply incorrect in its assertion that a majority of the United States Supreme Court has never recognized "judicial takings." The Supreme Court did exactly that in *Chicago Burlington & Quincy R.R. Co. v. Chicago,* 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897).

> If compensation for private property taken for public use is an essential element of due process of law as ordained by the 14th Amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the state within the meaning of that Amendment.

166 U.S. at 235, 41 L.Ed. at 984.

The ripeness argument fundamentally misconceives takings jurisprudence. There is a fundamental distinction between regulatory takings and takings effected by physical possession. *Yee v. City of Escondido,* 112 S.Ct. 1522, 118 L.Ed.2d 153 (1992). In cases where the property owner is compelled to suffer a physical invasion of his property, no matter how minute the intrusion, and no matter how weighty the public purpose behind it, the Court has required compensation. *Lucas v. South Carolina Coastal Council,* 112 S.Ct. 2886, 120 L.Ed.2d 798, 812 (1992).

Enforcing the ICA's newly created gathering rights for non-tenants would compel Nansay to suffer a physical invasion of its property. *See Nollan v. California Coastal Commission*, 483 U.S. 825, 831, 107 S.Ct. 3141, 97 L.Ed.2d 677, 685 (1987). The ripeness doctrine set out in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), does not apply to cases involving physical takings. *Austin v. City and County of Honolulu*, 840 F.2d 678, 681 (9th Cir. 1988). Thus, action by the State to enforce the newly created rights would give rise to a taking ripe for federal judicial review. *Cf. Robinson v. Ariyoshi*, 887 F.2d 215, 219 (9th Cir. 1989).

In regulatory takings, the landowner must establish that a regulation or state action "goes too far" and that he has not received just compensation. *MacDonald Sommer & Frates v. Yolo County*, 477 U.S. 340, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986). To establish that the State failed to offer just compensation, a landowner must seek and be denied compensation through state procedures, including an inverse condemnation action in state court. *Williamson County*, 473 U.S. at 195, 105 S.Ct. at 3121. Therefore, the federal ripeness doctrine obviously cannot be applied *in toto* to state proceedings. Moreover, we are not presently faced with a regulatory taking. The ICA's creation of non-tenant gathering rights is not tied to the issuance of the SMAP. This conversion of property, if allowed to stand, is analytically identical to California simply requiring the landowners to make an easement across their property available to the public in *Nollan*, which the Court there stated would no doubt have been a taking. 483 U.S. at 831, 107 S.Ct. at 685.

Furthermore, the reliance on *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980), by PASH and *amicus* Office of Hawaiian Affairs is misplaced. First, *Pruneyard* involved the conflict between individuals' constitutional free speech rights and a shopping center owner's property rights under the Fifth and Fourteenth Amendments. 447 U.S. at 76-77, 64 L.Ed.2d at 749. PASH has no such conflicting constitutional right here, because the only candidate, Article XII, Section 7, is expressly limited to protecting the rights of "ahupua'a tenants" and no one present before the Commission met that qualification. Second, *Pruneyard* involved a situation in which the property owner had invited the general public onto the property and the California Supreme Court made it clear that he could impose time, place, and manner restrictions on the expressive activity. 447 U.S. at 83, 64 L.Ed.2d at 753. Here, notwithstanding that Nansay has not invited the general public onto its still undeveloped property, the ICA's opinion would confer unfettered rights to enter the property based merely upon an assertion that some Hawaiian came onto the property to do something similar at some time in the past. Third, *Pruneyard* is inconsistent with the later cases of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35, 102 S.Ct. 3164, 73 L.Ed.2d 868, 882 (1982), *Nollan*, 483 U.S. at 831-32, 97 L.Ed.2d at 686, and *Lucas*, 120 L.Ed.2d at 812, all of which recognize that a physical occupation is a taking without regard to whether the action achieves an important public benefit or has only minimal economic impact on the landowner.

II. CONCLUSION

The briefs of PASH and other *amici* have attempted to portray Nansay as an uncaring, unenlightened developer. This is neither true nor relevant. The record demonstrates that Nansay has made very real efforts to meet and negotiate with concerned members of the public and has entered agreements and proposed specific conditions which were included in the SMAP to protect the coastal resources of Kohanaiki. Moreover, Nansay is entitled to the same rights, privileges and protections of any citizen and any landowner in the State of Hawaii. This is the mandate of our Constitution, a mandate that this Court has repeatedly demonstrated its commitment to uphold.

Nansay respectfully requests that this Court affirm the decisions of the Commission and vacate the opinion of the ICA.

DATED: Honolulu, Hawaii, October 20, 1993.

/s/ J. Robert Arnett, II
ROY A. VITOUSEK, III
J. ROBERT ARNETT, II
NANI LEE
Attorneys for Petitioner-
Appellee-Appellant
NANSAY HAWAII, INC.

NO. 15460

IN THE SUPREME COURT OF THE STATE OF HAWAII

PUBLIC ACCESS SHORELINE HAWAII, by JERRY ROTHSTEIN, its coordinator; and ANGEL PILAGO, Respondents-Appellants-Appellees, vs. HAWAII COUNTY PLANNING COMMISSION, by FRED Y. FUJIMOTO in his capacity as its chairman, Petitioner-Appellee-Appellant, and NANSAY HAWAII, INC., a Hawaii corporation, Petitioner-Appellee-Appellant.	CIVIL NO. 90-293K APPEALS FROM FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FILED HEREIN ON JUNE 7, 1991 THIRD CIRCUIT COURT HONORABLE RONALD IBARRA JUDGE (Filed Aug. 22, 1994)

PETITIONER-APPELLEE-APPELLANT NANSAY HAWAII, INC.'S FIFTH SUPPLEMENTAL BRIEF

and

CERTIFICATE OF SERVICE

CADES SCHUTTE FLEMING & WRIGHT
ROY A. VITOUSEK III
JOHN P. POWELL
B-303 Hualalai Center
75-170 Hualalai Road
Kailua-Kona, Hawaii 96740
Telephone No. (808) 329-5811
Attorneys for Petitioner-Appellee-Appellant
NANSAY HAWAII, INC.

* * *

I. ARGUMENT

The United States Supreme Court in *Dolan* affirms a central issue in this case: depriving a property owner of the right to exclude others constitutes the taking of private property without just compensation.

In *Dolan*, the petitioner challenged the decision of the Oregon Supreme Court which allowed the City of Tigard to condition approval of a building permit on the dedication of a portion of petitioner's property for flood control and traffic improvements. *Dolan*, 114 S.Ct. at 2312. Certiorari was granted to resolve an open question from the pivotal decision in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987): "what is the required degree of connection between the exactions imposed by the city and the projected impacts of the proposed development." *Dolan, Id.* This brief will first discuss the deprivation of

the right to exclude as an unconstitutional taking and next address the standard enunciated in *Dolan* of "rough proportionality."

A. DEPRIVATION OF NANSAY'S RIGHT TO EXCLUDE OTHERS IN EXCHANGE FOR A PERMIT IS AN UNCONSTITUTIONAL TAKING.

The City of Tigard in *Dolan* developed a comprehensive plan requiring property owners in a central business district to limit total site coverage to 85% of the parcel, (leaving 15% as open space), requiring new developments to dedicate land for pedestrian pathways, and requiring floodplains to remain free of structures. *Dolan,* 114 S.Ct. at 2313.

The *Dolan* petitioner applied for a permit to expand her existing store and parking area. The city conditioned the permit on petitioner's dedication of a portion of property lying within the floodplain and an additional dedication of a 15-foot strip of land as a bicycle/pedestrian pathway. The dedication equalled about 10% of petitioner's property and was allowed to meet the 15% open space requirement. *Id.* Petitioner challenged the dedication before the Land Use Board of Appeals ("LUBA"), which found a "reasonable relationship" between the conditions and the proposed development. The petitioner appealed the LUBA decision, asserting that the dedication constituted an uncompensated taking under the Fifth Amendment. The Oregon court of Appeals and the Oregon Supreme Court affirmed the LUBA decision. 317 Ore. 110, 854 P.2d 437 (1993). The U.S.

Supreme Court granted certiorari, 510 U.S. ___, 114 S.Ct. 544, 126 L.Ed.2d 446 (1993) because of an alleged conflict between the Oregon Supreme Court's decision and *Nollan*.

Reiterating its positions in prior cases, the United States Supreme Court stated that: 1) the petitioner's forced dedication would unquestionably be a taking if required outright and not as a condition of a permit, *Nollan*, 483 U.S. at 831; and 2) the public access requirement deprived petitioner of the right to exclude others, "one of the most essential sticks in the bundle of rights that are commonly characterized as property," *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). The Court additionally emphasized that under the doctrine of "unconstitutional conditions," the government may not "require a person to give up a constitutional right – here, the right to receive just compensation when property is taken for a public use – in exchange for a discretionary benefit conferred by the government where the property sought has little or no relationship to the benefit." *Dolan*, 114 S.Ct. at 2317 (citations omitted).

In *Dolan*, the petitioner was required to not only forego building in the floodplain but also to dedicate a portion of her land as a public greenway, resulting in petitioner's loss of ability to exclude others. The court concluded that:

> [t]his right to exclude others is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna*, 444 U.S. at 176. It is difficult to see why recreational visitors trampling along petitioner's floodplain easement are sufficiently related to

> the city's legitimate interest in reducing flooding problems. . . .

Id. at 2320-21. In reversing and remanding the case, the Court recognized the city's goal of reducing flooding hazards and traffic congestion, but emphasized that a "strong public desire to improve a public condition will not warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Id.* at 2322, citing *Pennsylvania Coal Co. v. Mahon*, 416, 260 U.S. 393, 416 (1992).

As did the City of Tigard in *Dolan*, the ICA in the instant case has gone too far. In November of 1990, under the requirements of the Hawaii Coastal Zone Shoreline Management Act ("CZMA"), the Hawaii Planning Commission ("Commission") strictly conditioned approval of Nansay's Special Management Area Use Permit ("SMAP") 1) on the preservation of anchialine ponds within the project area, 2) on the development/implementation of an anchialine pond management plan (in consultation with the Army Corps of Engineers and the U.S. Fish and Wildlife Service), 3) the development of an extensive public access plan, and 4) the preservation of significant archaeological sites. Despite the protective conditions imposed by the Commission, the ICA opinion in essence imposes additional permitting conditions on Nansay by making it subject to "rights" of physical invasion by non-tenant Hawaiians. As is clearly enunciated by the Hawaii Supreme Court in *Kalipi v. Hawaiian Trust Co.*, 66 Haw 1, 656 P.2d 745 (1982) and *Pele Defense Fund v. Paty*, 73 Haw 572, 837 P.2d 1247 (1992), only tenant Hawaiians (or possibly tenants of an adjoining ahupua'a)

have access rights to property. No such rights exist in the Nansay matter.

The Hawaii Constitution, Article XII, Section 7, is expressly limited to protecting the rights of "ahupua'a tenants" and no such tenants appeared before the Commission. Requiring consideration of non-ahupua'a access is akin to requiring a public, as opposed to a private, greenway in *Dolan* – the permitting condition has risen to the level of an uncon titutional taking.

The ICA opinion, through its invention of new access rights, strips Nansay of an essential right of private ownership – the right to exclude others. Any legitimate state interest in conditioning a permit on the protection of gathering rights of ahupua'a tenants does not apply in this case, as the ICA considers protection of rights that didn't exist prior to the ICA opinion. Additionally, the Hawaii Supreme Court has repeatedly held (and the ICA opinion recognizes) that Article XII, Section 7 does not require the preservation of lands in their natural state and only guarantees access to undeveloped lands. *See, e.g., Pele Defense Fund*, 7 Haw. at 621 n.36, 837 P.2d at 1272 n.36.

As the *Dolan* court exemplifies, a property holder is entitled to just compensation under the Fifth and Fourteenth Amendments of the United States Constitution, when a governmental agency takes a property interest through a permitting condition. The ICA opinion effects a suspension of Nansay's SMAP while non-existent "rights" of access are considered, constituting a taking under the U.S. Constitution and Article I, Section 5, and Section 20 of the Hawaii Constitution.

B. THE *DOLAN* TEST OF ROUGH PROPORTIONALITY IS VIOLATED BY THE CONSIDERATION OF NON-EXISTENT HAWAIIAN RIGHTS.

The *Dolan* court sets forth a two-part test to distinguish the appropriate exercise of governmental authority from an improper exercise of eminent domain. First, an "essential nexus" must exist between a "legitimate state interest" and a permit condition. *Dolan*, 114 S.Ct. at 2316, citing *Nollan*, 483 U.S. at 837. Second, if a nexus exists, the exactions of the permitting condition and the projected impact of the proposed development must have the required degree of connection, here, the newly-stated standard of "rough proportionality." *Dolan*, 114 S.Ct. at 2317.

1. Nexus.

While the protection of gathering rights of ahupua'a tenants, as established by Article XII, Section 7, *Pele Defense Fund* and *Kalipi* is assuredly a legitimate state interest, no such rights are involved here. No ahupua'a tenant (or tenant of an adjoining ahupua'a) appeared before the Commission. As discussed extensively in Nansay's prior briefs, the gathering rights of non-tenant Hawaiians did not exist under traditional, constitutional, statutory, or case law prior to the ICA's creation of such rights in *PASH v. Nansay*. Because these rights have no basis in law, they cannot constitute a legitimate governmental interest.

A legitimate state interest does exist, however, under the mandates of the CZMA. The CZMA requires developments in the special management area to be subject to reasonable terms and conditions to 1) ensure adequate access to publicly owned or used beaches, recreation areas and natural resources; 2) preserve public recreation areas and natural resources; and 3) minimize adverse effects to water resources and scenic and recreational amenities. HRS § 205A-26. It is undisputed that the Commission properly applied the criteria of HRS § 205A-26, and none of the parties challenged the validity of the conditions placed on Nansay's SMAP by the Commission.

There is no nexus between the legitimate state interest of preserving shorelines and protecting access rights of ahupua'a tenants and a permit condition holding Nansay subject to judicially-invented access rights of non-tenants. For the legitimate state interest of the CZMA, a requirement that an additional Hawaiian group be granted special access to Nansay's property does not add to the preservation and protection of the coastal resources – the anchialine ponds. (In fact, requiring such access may have a negative effect on the resource.) For the legitimate state interest of protecting Hawaiian gathering rights, no holders of such rights appeared before the Commission, so no state interest was advanced. The nexus required by *Nollan* and further defined by *Dolan* simply does not exist.

2. Rough Proportionality.

Arguably, the most important holding of *Dolan* was the clarification of the degree of the required relationship

(connection) between the exactions demanded by a governmental agency and the projected impact of a proposed development. The exaction demanded by the California Coastal Commission in *Nollan* was found to bear no relationship whatsoever to the impact of the proposed development, so the Court had not been required to enunciate any specific standard in that case. *Dolan*, 114 S.Ct. at 2316.

The Court considered, and rejected, the very loose standard adopted by Montana and New York courts, requiring only very generalized statements as to the necessary connection. *Id.* at 2318. The Court also rejected the "specific and uniquely attributable" test adopted by Illinois, New Hampshire, New Jersey, Ohio and Rhode Island courts. *Id.* at 2319. The Court cited with approval the "reasonable relationship standard" adopted by a number of states, and quoted at length the Supreme Court of Nebraska's opinion in *Simpson v. North Platte*, 206 Neb. 240, 245, 292 N.W.2d 297, 301 (1980) where that court stated:

> the distinction therefore which must be made between an appropriate exercise of the police power and an improper exercise of eminent domain, is *whether the requirement has some reasonable relationship or nexus to the use* to which the property is being made or is *merely being used as an excuse for taking property* simply because at that particular moment the land owner is asking the city for some license or permit. (Emphasis added.)

The *Dolan* court did not adopt the "reasonable relationship" standard, however, because it found the standard to be "confusingly similar to the term 'rational

basis' which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment." *Dolan*, 114 Sup. Ct. at 1319. The court instead found:

> We think that terms such as "rough proportionality" best encapsulates what we hold to be requirement of the fifth amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the *required dedication is related both in nature and extent to the impact of the proposed development*. 114 Sup. Ct. at 2319-20.
>
> (Emphasis added.)

The ICA opinion in *PASH v. Nansay* contemplates the imposition of a condition beyond those already imposed upon Nansay by the Commission, namely, the granting of physical access to non-ahupua'a tenants. As *Nollan* made clear and *Dolan* reiterates, an exaction is a proper exercise of police power only where the government agency would be empowered to deny the development for the same reason it seeks the exaction. *Nollan*, 483 U.S. at 836,

* * *

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No. 95-1159

In the

Supreme Court of the United States

October Term, 1995

NANSAY HAWAII, INC.,
Petitioner,

v.

PUBLIC ACCESS SHORELINE HAWAII,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of Hawaii

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

* JAMES. S. BURLING
*COUNSEL OF RECORD
STEPHEN E. ABRAHAM
OF COUNSEL
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888
Attorneys for Amicus Curiae

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Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully moves this Court for leave to file the attached amicus curiae brief in support of petitioner, Nansay Hawaii, Inc. Consent to the filing of this brief has been granted by counsel for petitioner, and has been lodged with the Clerk of this Court. Respondent, Public Access Shoreline Hawaii, has withheld consent, necessitating the filing of this motion.

IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating in the public interest. PLF has over 20,000 supporters nationwide. Policy for PLF is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board of Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only when the Foundation's position has broad support within the general community. PLF's Board of Trustees has authorized the filing of a brief *amicus curiae* in this matter.

PLF has participated in numerous cases involving constitutional protection of property rights before this Court and other courts representing both *amicus curiae* and property owners. Particularly noteworthy of PLF's involvement in land use and the Takings Clause cases, Foundation attorneys represented the Nollans in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and participated as *amicus curiae* in cases from *Agins v. City of Tiburon*, 447 U.S. 255 (1980), to *Dolan v. City of Tigard*, 512 U.S. ___, 129 L. Ed. 2d 304 (1994).

PLF seeks to augment the argument in the petition for writ of certiorari. PLF believes that its public policy perspective and litigation experience in support of economic rights will provide an additional needed viewpoint with respect to the issues presented by this case.

For the above reasons, Pacific Legal Foundation requests that its motion to file the amicus curiae brief which follows be granted.

DATED: March ___, 1996.

Respectfully submitted,

* JAMES. S. BURLING
*COUNSEL OF RECORD
STEPHEN E. ABRAHAM
OF COUNSEL
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888

By //JAMES S. BURLING//
JAMES S. BURLING

Attorneys for Amicus Curiae,
Pacific Legal Foundation

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

The interests of amicus curiae are set forth in the preceeding motion and are adopted herein.

STATEMENT OF THE CASE

Petitioner, Nansay Hawaii, Inc. (Nansay), is the owner of real property on the Big Island of Hawaii. Seeking to develop

otherwise fallow ground, Nansay applied for a Special Management Area Use Permit from the Hawaii Planning Commission (Commission). A public hearing was held by the Commission at which Public Access Shoreline Hawaii (PASH), a group alleging interests in public beach access, and Mr. Angel Pilago[1] sought to intervene in opposition to the application. When no party opposing the permit could explain how his interests were distinguishable from those of the general public, the Commission granted Nansay's application for the permit.

PASH appealed the final decision of the Commission, pursuant to Hawaii Revenue Statute §§ 91-14 and 205A-6. On June 7, 1991, the Hawaii Circuit Court for the Third Circuit reversed the Commission, holding that PASH and Mr. Pilago had individual interests grounded in traditional rights and religious practices.

Nansay appealed the decision to the Intermediate Court of Appeal which on May 7, 1993, reversed the lower court as to Mr. Pilago but affirmed the court as to the grounds upon which relief was granted to PASH. Nansay petitioned for a writ of certiorari to the Hawaii Supreme Court which granted certiorari and then ruled that newly expanded native Hawaiian gathering rights must be protected under the Hawaii Constitution and Hawaiian law.

Before this decision, a Hawaiian native tenant could gather items such as leaves and firewood from the land so long as the tradition had been practiced by the native or his predecessors and this gathering did not interfere with the rights of the landowner. However, if the landowner developed the land, eliminating the source of the gathered items, the gathering right could be extinguished. After the decision, the gathering right is extended to anyone with even a drop of Hawaiian ancestry who might assert an interest in gathering, irrespective of whether the practice had been observed in the past. Furthermore, the landowner can be prevented from engaging in any development which might eliminate the source of the gathered items. As a result of this

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[1] A native Hawaiian no longer a party to this litigation.

decision, Nansay's right to develop its property has been abridged if not enjoined altogether.

Nansay petitioned for, and Pacific Legal Foundation supports, a writ of certiorari to the Supreme Court of the United States.

SUMMARY OF ARGUMENT

The rights of the people inhabiting the islands of Hawaii have been regulated and defined by written laws since 1839. In that year, His Majesty King Kamehameha III, as Supreme Lord of the Islands, took possession of all of the fishing grounds. He then gave one-third of the grounds to the common people, one third to the landlords, and retained one-third for himself. *Haalelea v. Montgomery*, 2 Haw. 65 (1858). Given this Court's extensive treatment of the Takings Clause, there can be no doubt that had King Kamehameha attempted this forced redistribution of land today without providing adequate compensation, he would have violated the Takings Clause of the Fifth Amendment as applied to the States by the Fourteenth Amendment. However, this Court's lessons have failed to impress the Hawaiian Supreme Court which in this case has so manipulated Hawaiian law as to threaten the very notion of property ownership, a unilateral action no less serious than the King's redistribution.

In this case, the Supreme Court of the State of Hawaii expanded a relatively benign native gathering custom to such an extraordinary degree that it now threatens owners of property in Hawaii who seek to develop their land. This expansion was not the result of any passage of new law nor consistent with past interpretations of Hawaiian law. Facing a challenge that its decision violated the United States Constitution, the Hawaiian Supreme Court declared that western understandings of property law are not universally applicable in Hawaii.

The decision of the Hawaiian high court is disturbing for at least two reasons: Firstly, by taking Nansay's property without providing just compensation, the state has violated the Fifth and Fourteenth Amendments. Secondly, should the decision stand, the ability of the state, under the guise of custom, to exact any

servitude against property owners shall go unchecked. This could result in a redistribution of property interests, if not a fundamental redefinition of property, the likes of which has not occurred since the time of King Kamehameha III.

The ruling of the Hawaiian court is in direct conflict with decisions of this Court. Furthermore, given the extraordinary degree to which the decision departs from accepted case law, the United States District Court for the District of Hawaii as well as the Ninth Circuit Court of Appeals have already rejected its holdings in the short time that has passed since this state court decision was rendered.

The decision profoundly affects the rights of property owners to their detriment, raising issues of tremendous national importance which should be resolved by this Court.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

"The debates in the Constitutional Convention make clear that the purpose of the establishment of one supreme national tribune was, in the words of John Rutledge of South Carolina, 'to secure the national rights & *uniformity of judgments*.'" Chief Justice Vinson, Address Before the American Bar Association, September 7, 1949, 69 S.Ct. v, vi (emphasis added). Chief Justice Vinson's observations are codified in Supreme Court Rule 10(c) which lists among the considerations governing review on certiorari the circumstance when a state court of last resort has decided an important federal question in a way that conflicts with relevant decisions of the Supreme Court. Rule 10(b) includes as grounds for review when a state court of last resort has decided an important federal question in a way that conflicts with the decision of a United States Court of Appeals. These compelling grounds for review are present in this case.

THIS COURT SHOULD RESOLVE THE CONFLICT OVER WHETHER THE EXPANSION OF NATIVE HAWAIIAN GATHERING RIGHTS CONSTITUTES A TAKING REQUIRING JUST COMPENSATION

A. The Decision Is in Conflict with the Decisions of the Supreme Court

Nearly three-quarters of a century have passed since Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), warned that when the protection of private property "is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears." *Id.* at 415. "While property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.*

In *Nansay Hawaii, Inc. v. Public Access Shoreline Hawaii*, 79 Haw. 425, 903 P.2d 1246 (1995), this Court is presented with the very type of case of which Justice Holmes foretold. Here, a native gathering right to gather firewood, house-timber, aho cord, thatch, or ki leaf has been permitted to blossom under the nurturing care of the Hawaiian Supreme Court until now, like a vine which would strangle the tree on which it has taken hold, this "custom" threatens to eclipse and perhaps even extinguish the rights of the holder of the estate in fee.

The manner by which the Hawaiian court has transformed a custom of native gathering rights into a protected interest superior to that of the property owner bears some recounting, if only because of its extraordinary evolution.

The modern development of Hawaiian property ownership could be said to have begun in 1846 when the territorial government enacted the "Principles Adopted by the Board of Commissioners to Quiet Land Titles in the Adjudication of Claims Presented to Them," which set forth three classes possessing vested land rights: the government, the landlord, and the tenant. Louis Cannelora, THE ORIGIN OF HAWAII LAND TITLES AND OF THE RIGHTS OF NATIVE TENANTS 1, 10 (1974), *quoted in Pai 'Ohana v. United States*, 875 F. Supp. 680, 685-86 (D. Haw.

1995), *aff'd*, ___ F.3d ___ (9th Cir.) (1996 WL 44731) (Feb. 2, 1996).

The Act of June 7, 1848, 2 REV. LAWS HAW. 2152-76 (1925), distributed land subject to the rights of the native tenants. Later acts would define the rights, granting authority to the Land Commission to award fee simple titles to native tenants who occupied and improved the land.

Although subjected to various interpretations in the intervening hundred years, in addition to Article XII of the Hawaiian Constitution,[2] two documents serve as the sources from which native Hawaiian rights are derived: Hawaii Revised Statutes §§ 7-1 and 1-1.

> Section 7-1 preserves to native tenants:
> the right to take firewood, house-timber, aho cord, thatch, or ki leaf, from the land on which they live, for their own private use, but they shall not have a right to take such articles to sell for profit. The people shall also have a right to drinking water, and running water, and the right of way.

Haw. Rev. Stat. § 7-1 (1859, as amended 1955).

However, it is the last source, Hawaii Revised Statutes § 1-1, as interpreted and applied by the Hawaiian Court in this case, that proves the most unsettling. That section provides:

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[2] Hawaii Constitution, Article XII, Section 7, provides:

> The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a tenants who are decendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

Haw. Const. Art. XII, § 7 (enacted 1978). To the extent that the section does no more than reaffirm laws previously in existence, it does not in and of itself constitute a taking. However, if as here the courts are permitted to use the section to justify the creation of new customs and traditions which impose unreasonable limitations on property owners, the new interpretation goes too far and a taking should be recognized. *Pennsylvania Coal*, 260 U.S. at 415.

> The common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as ... established by Hawaiian usage ... .

Haw. Rev. Stat. § 1-1 (1892, as amended 1955).

Previous courts of Hawaii attempted to define this section by reference to the exception. However, these decisions typically related to procedural or technical aspects of laws and rarely, if ever, imposed limitations upon or abrogated substantial liberty or property interests. For example, in *Kaleialii v. Sullivan*, 23 Haw. 38 (1915), *aff'd*, 242 F. 446 (9th Cir. 1917), the court held that the word "heir" was not essential to convey a fee simple in Hawaii. These early interpretive efforts may be ascribed to a willingness on the part of the Hawaiian courts to apply with some degree of tolerance a body of English common law as far removed from the former Hawaiian territory as are poles of the two hemispheres.

In *Hawaii v. Zimring*, 52 Haw. 472, 479 P.2d 202 (1970), the Supreme Court recognized that under Section 7-1 the usage which establishes an exception must predate November 25, 1892, and could not be established by a generalized affidavit of the kind proferred in that case.[3] In *County of Hawaii v. Sotomura*, 55 Haw. 176, 183, 517 P.2d 57, 62 (1973), the Court stated that in the "absence of ... evidence of Hawaiian custom relevant to the question, we resort to common law principles."

Even as late as 1982, the Hawaii Supreme Court continued to recognize the delicate balance that must be maintained between custom and common law, ensuring that the one did not overwhelm the other to unconstitutional proportions. In *Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 4-7, 656 P.2d 745, 748-50 (1982), the court reaffirmed an obligation to recognize native Hawaiian gathering rights, "remnants of an economic and physical existence

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[3] The affiant deposed that he was familiar with land usage on the island and its relation to volcanic eruptions, "both of his own knowledge and knowledge transmitted to him by his mother and ... father." *Hawaii v. Zimring*, 479 P.2d at 203.

largely foreign to today's world," *id.* at 749, even when they may "conflict with the exclusivity traditionally associated with fee simple ownership of land." *Id.* at 748. However, the court emphasized that the gathering rights were limited by the unambiguous language of the statute.

> These rights are rights of access and collection. They do not include any inherent interest in the natural objects themselves until they are reduced to the gatherer's possession. *As such those asserting the rights cannot prevent the diminution or destruction of those things they seek. The rights therefore do not prevent owners from developing lands.*

Id. at 749 n.2 (emphasis added). The court continued:

> [I]f this limitation were not imposed, there would be nothing to prevent residents from going anywhere within the ahupua'a, including fully developed property, to gather the enumerated items. In the context of our current culture this result would so conflict with understandings of property, and potentially lead to such disruption, that we could not consider it anything short of absurd and therefore other than that which was intended by the statute's framers.

Id. at 750.[4]

Notwithstanding its decision in *Kalipi*, begining in 1992, the Hawaii Court appeared to depart from its practice of harmonizing Hawaiian custom and property rights protected under the Fifth and Fourteenth Amendments to the United States Constitution.

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[4] An *ahupua'a* is a division of land running from the mountains to the sea which provides a variety of resources needed for subsistence. *Palama v. Sheehan*, 50 Haw. 298, 301, 440 P.2d 95 (1968). This division provides access for the residents to a wide variety of climatic and biological zones.

Only ten years after its decision in *Kalipi*, the Court revisited its interpretation of the statute, this time extending native gathering rights beyond the "unambiguous language of the statute." *Kalipi*, 656 P.2d at 750. In *Pele Defense Fund v. Paty*, 73 Haw. 572, 837 P.2d 1247 (1992), the court held that native Hawaiian rights might extend beyond the ahupua'a in which a native Hawaiian resides where such rights have been customarily and traditionally exercised in this manner.

In this case, the Hawaiian Court, continuing its activist treatment of native rights, rejected the express limits in Section 7-1, expanding without definition the types of practices which could be considered customary. Nansay Hawaii, Inc.'s Petition for Writ of Certiorari at Appendix (Pet. App.) 37a. Furthermore, the court vastly increased the numbers of those who could assert claims of native rights, eliminating the requirement of residency which existed after *Pele*. Pet. App. at 52-53a. Finally, the Court ruled for the first time that this "gathering right" could be asserted to the *exclusion* of the owner's right to develop. Pet. App. at 58-59a.

This decision is but one more step in a chain of judicial decrees which has caused the subordination of private property interests to customs, whether ancient or newly crafted.

The important lessons of this case, as decided by the Hawaiian Supreme Court, may be drawn from the following excerpted passages:

> [W]e read the discussion of customary rights in *Oni* and *Kalipi* as merely informing us that the balance of interests and harms clearly favors a right of exclusion for private property owners as against persons pursuing *non-traditional* practices or exercising otherwise valid customary rights in an *unreasonable* manner.

Pet. App. at 36-37a (emphasis in original).

Here, the court defines the moment of departure from every one of its precedents. Past cases did not only exclude "nontraditional" or "unreasonable" practices. Rather, gathering rights were strictly limited to those enumerated in the statute and could be extinguished were the land developed and the resources

no longer to be found or practically gathered. *Kalipi*, 656 P.2d at 749 n.2.

> Common law rights ordinarily associated with tenancy do not limit customary rights existing under the laws of this state.

Pet. App. at 53a.

The effect of this statement is twofold. Firstly, the court turns its back on Hawaiian history and its own decisions relating to the requirement of tenancy.[5] Secondly, the court expands the class of those who may assert standing to challenge a permit to those who would otherwise be ineligible to claim rights under customs protected by the statutes.

1. Regulatory Taking

This Court has heretofore observed "that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case.'" *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978) (quoting *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958)). Factors which could lead to the conclusion that a taking had occurred include the regulation's economic impact on the claimant, the extent to which the regulation has interfered with distinct investment-backed expectations, and the character of the governmental action. 438 U.S. at 124. Applying these factors to this case, the Hawaiian

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[5] As was stated in *Kalipi*:

> We ... interpret[] the gathering rights of § 7-1 to assure that lawful occupants of an *ahupua'a* may, for the purpose of practicing native Hawaiian customs and traditions, enter undeveloped lands within the *ahupua'a* to gather those items enumerated in the statute. ... By "lawful occupants" we mean persons residing within the *ahupua'a* in which they seek to exercise gathering rights. ... This limitation is dictated by the language of the statute itself. ... It requires that the tenants be "on" the land before they become entitled to take products "from the land on which they live."

Kalipi, 656 P.2d at 749-50 (emphasis added).

statutes as interpreted by the State Court and as applied effect a taking of Nansay's property.

However, more recently, this Court held that states cannot decree limitations anew which prohibit all economically beneficial use of the land without compensation.

> Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1029 (1992).

In this case, the Hawaiian court has so convoluted state laws as to extinguish both a valuable right of petitioner to develop its property and any vitality in *Lucas*. Attempting to *Lucas'* language, the court finds justification for its actions not in a new legislative decree but, rather, in an "ancient custom."

The Hawaii court analogizes its application of custom to that of a preexisting easement. Pet. App. at 61a (quoting *Lucas*, 505 U.S. at 1027). However, in so doing, the court fails to appreciate the magnitude of its decision upon private property interests. Customs cannot be compared to permanent easements, the bounds of which can more easily be ascertained, their characteristics defined, and rights thereto established. Rather, customs are more subjective and less absolute.[6]

Accordingly, pursuant to the newly minted doctrine of the Hawaiian court, a person who has any degree of Hawaiian kinship traceable to 1778 and who can articulate an interest in some way grounded in Hawaiian custom and usage, can impress upon an estate a new servitude which can serve as an impediment to development. Such a servitude has never been recognized and is,

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[6] Custom as been defined as "such a usage as by common consent and uniform practice has become of the law of the place, or of the subject matter to which it relates." *Oregon v. Hay*, 254 Or. 584, 462 P.2d 671 (1969) (quoting 1 BOUV. LAW DICT., Rawle's Third Revision, Vol. 1 at 742 (1914)).

indeed, contrary to the traditional understandings of Hawaiian custom and the law, as explained in *Oni v. Meek*, 2 Haw. 87 (1858); *In re Boundaries of Pulehunui*, 4 Haw. 239 (1879); *Damon v. Tsutsui*, 1 Haw. 678 (1930); and *Kalipi*, 656 P.2d 745.

Regrettably, Hawaii is not the first state to restrict property rights by application of "customs."[7] In his dissent in *Stevens v. City of Cannon Beach*, 317 Or. 131, 854 P.2d 449 (1993), *cert. denied*, ___ U.S. ___, 127 L. Ed. 2d 679 (1994), Justice Scalia warned of the risk to property rights when custom was used under the guise of "rules of state substantive law" to impose limitations on the use of property.

> [The] Constitution leaves the law of real property to the States. But just as a State may not deny rights protected under the Federal Constitution through pretextual procedural rulings, neither may it do so by invoking nonexistent rules of state substantive law. Our opinion in *Lucas*, for example, would be a nullity if anything that a State court chooses to denominate "background law" ... could eliminate property rights.

127 L. Ed. 2d at 682.

Here, the Hawaiian Court has significantly expanded laws relating to customs; rights of property owners reaffirmed by this Court in *Lucas* have been reduced to nothing more than western notions of property which must yield to native Hawaiian practices. This flagrant attempt to sidestep *Lucas* is the very type of case about which Justice Scalia warned and which this court should overrule. Before deferring to a newly crafted or recognized scheme of custom which would extinguish a vested property right,

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[7] In his commentaries, Sir William Blackstone set forth certain prerequisites for a custom: it must be ancient, used so long that there is no memory to the contrary; so to must it have been exercised without interruption; also, it must be peaceable and free from dispute; it must be reasonable, appropriate to the land and usages of the community; it must be certain as well as obligatory. Finally, the custom may not be inconsistent with other customs or laws. *Oregon v. Hay*, 462 P.2d at 677, *citing* 1 BLACKSTONE, COMMENTARIES 75-78.

this Court should demand nothing less than demonstrable evidence of the custom. It should be insufficient for anyone seeking to preclude Nansay from enjoying its property rights merely to allege that a custom exists which is incompatible with Nansay's development plans.

2. Judicial Taking

Nansay also challenges the decision as a judicial taking. Pet. at 21. Given the extraordinary degree to which the Hawaiian court changed the now dominating relationship of custom over common law property interests, this basis would have seemed entitled to some reasonable degree of inquiry, certainly far more than was accorded by the Hawaiian court which dispatched it with little if any regard.

In *Chicago, Burlington & Quincy Railroad Company v. City of Chicago*, 166 U.S. 226, 235 (1896), Justice Harlan, delivering the opinion of the Court, observed that a state may not disregard the prohibitions of the Fourteenth Amendment. Justice Harlan rhetorically asked if a state could "make anything due process of law which, by its own legislation, it chooses to declare such?" Having answered his own question in the negative, he averred that the same question posed in reference to judicial proceedings could lead to the same answer.

> If compensation for private property taken for public use is an essential element of due process of law as ordained by the 14th Amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, is deemed the act of the state within the meaning of that Amendment.

Id. In response to Nansay's judicial takings claim, the Hawaiian court (Pet. App. at 60a) questions the viability of the judicial takings doctrine in light of *Corporation of Presiding Bishop v. Hodel*, 637 F. Supp. 1398 (1986), *aff'd*, 830 F.2d 374 (D.C. Cir. 1987), a case which is certainly not binding upon this Court.

Justice Harlan concluded that "without ... compensation the appropriation of private property to public uses, *no matter under what form of procedure it is taken*, would violate the provisions of

the Federal Constitution." *Chicago, Burlington & Quincy*, 166 U.S. at 239 (emphasis added). Nonetheless, the Hawaiian court relies upon its own rejection of non-Hawaiian jurisprudence to avoid certain constitutional infirmity, positing an argument which is *non sequitur* at best.

> Nansay's argument places undue reliance on western understandings of property law that are not universally applicable in Hawaii.

Pet. App. at 61a. In this case, the Hawaiian Supreme Court has taken three sources of law, two Hawaiian statutes and a contemporary addition to the state constitution, and so expanded the scope of "custom" as well as those who may claim the protection of customary usage, that the right to enjoy private property, guaranteed under the Fifth and Fourteenth Amendments has been virtually destroyed. Before its decision, only a tenant or the tenant's successors who had practiced native gathering rights could continue the custom and then, only if the land remained undeveloped and the resources were available. After the Hawaiian court's decision below, any person with even a drop of Hawaiian ancestry can claim a gathering right, even if not a tenant on the land and even if to do so would preclude the property owner from developing the land. The Hawaiian court has rewritten Hawaiian law in such a manner as is in conflict with this Court's takings decisions and violates the Fifth and Fourteenth Amendments to the United States Constitution.

3. Equal Protection

As was observed above, the Hawaii Supreme Court has sought by application of "Hawaiian customs" to strip this Court's decisions upholding property rights under the Fifth and Fourteenth Amendments of all meaning.

However, beyond the issue of property rights, by eliminating almost every requirement of the Hawaiian statute which limits gathering rights and increasing the numbers of those who can assert a claim, based solely on race, the Hawaiian court creates

a bundle of property rights for "native" Hawaiians at the expense of fee owners.[8]

The Fourteenth Amendment to the United States Constitution provides in part that no state shall deny to any person within its jurisdiction the equal protection of the laws. U.S. CONST. AMEND. XIV, § 1. This Court has consistently invalidated explicit governmental discrimination against minorities.[9]

While the general rule prohibits discrimination based on race, some classifications involving Native Americans have been upheld.[10] However, classifications relating to natives have been limited to cases involving Native American Indians and are based

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[8] While not treated by Nansay in its petition, Pacific Legal Foundation believes this issue to be of such importance as to warrant this Court's attention. Where necessary to properly dispose of the case, this court has on occasion requested that the parties address additional questions. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247 n.12 (1981) (consideration of issues outside of bounds of questions with respect to which certiorari was granted not inappropriate when resolution of those questions is necessary for proper disposition of the case); *see also Pennhurst State School v. Halderman*, 447 U.S. 904 (1980) (granting writ of certiorari and requesting briefs and argument on additional question). Furthermore, given its importance, additional briefing by the parties on this issue may be warranted. *Allied-Signal, Inc. v. Director, Division of Taxation*, 503 U.S. 928 (1992) (restoring case to calendar for reargument and requesting supplemental briefs).

[9] *See, e.g., Loving v. Commonwealth of Virginia*, 388 U.S. 1, 11 (1967). "Over the years, this Court has consistently repudiated '(d)istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'" (Citations omitted).

[10] *Morton v. Mancari*, 417 U.S. 535 (1974) (legislation which grants preference toward Indians is not invidious racial discrimination based on "Congress' unique obligation" toward the Indians); *Washington v. Confederated Bands and Tribes*, 439 U.S. 463 (1979).

on Congress' Article 1, § 8, power to deal with this group.[11] Furthermore, the classifications involved public "interests" such as jobs or federal property. However, this case implicates not a public but a *private* property interest.

The Hawaiian Court takes a portion of Nansay's property rights and gives it to native Hawaiians, based on nothing more than an evolving definition of "custom" and the presence of a drop of Hawaiian blood. There is no precedent nor can there be any justification for a forced redistribution of property interests based on the dubious racial classification, "a drop of Hawaiian blood," crafted by the Hawaiian court. Such an expansive redefinition of rights should be strictly scrutinized by this Court.

B. The Decision Is in Conflict with the Decisions of the United States Court of Appeals

In *Erie v. Tompkins*, 304 U.S. 64 (1938), this Supreme Court established the general principle that the decisions of a state's highest court constitute part of the "laws of the several states" which federal courts are required in civil actions to regard as rules of decision in cases where they apply. The Court of Appeals for the Fifth Circuit in *Maryland Casualty Co. v. Williams*, 377 F.2d 389 (5th Cir. 1967), regarded as a purpose for this principle the assurance of equal administration of justice in co-ordinate state and federal courts. And in *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), this Court stated that property interests are not created by the Constitution but, rather, stem from such independent sources as state law.

Reading these three cases together, a federal court deciding a question relating to a property interest would appear compelled to follow state law.

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[11] *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980); *Ramah Navajo School Board, Inc. v. Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982).

However, precisely the reverse occurred in the case of *Pai 'Ohana v. United States*, 875 F. Supp. 680, *aff'd*, ____ F.3d ___. (1996 WL 44731).[12]

There the Court of Appeals, affirming the District Court, had the opportunity to review the scope of native tenants' rights in light of the Hawaiian Supreme Court's decision in this case.

Pai 'Ohana, claiming under Hawaii statutory and case law a reserved customary right of exclusive use and occupancy in federal park lands, asked the District Court to

> consider more recent decisions, particularly those of the Hawaii Supreme Court under Chief Justice Richardson, and to conclude that because Dowsett "was decided during an era when the Hawaii courts were bent upon conforming Hawaiian law to western property concepts," it "should therefore be reviewed in a different light today."

875 F. Supp. at 691-92 (citation omitted). Significantly, in a footnote, Pai 'Ohana observed that "the Hawaii Supreme Court has recently reembraced the Richardson Court's activist policy of affirming the rights of native tenants, particularly in regard to rights of use and access on undeveloped lands that were patented during the Mahele."[13] 875 F. Supp. at 692 n.25.

The Court of Appeals in *Pai 'Ohana*, had the opportunity to consider the Hawaiian Supreme Court's decision in this case and squarely rejected it. The court refused to accept the contentions of the appellants in *Pai 'Ohana* who advocated adoption of the holdings of this case. The Court of Appeals rejected the proposition that a native tenant could rely on native customs to

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[12] The United States District Court decided *Pai 'Ohana* after this case was decided by the Hawaii Supreme Court but before the opinion was published. However, on appeal, the Court of Appeals for the Ninth Circuit asked for and received briefs on this case before rendering its decision.

[13] *Mahele* refers to division, here of land. During the Great Mahele of 1848, the Kingdom of Hawaii awarded fee title to many of the *ahupua'a* in the Hawaiian Islands. *Pai 'Ohana*, 875 F. Supp. at 683 n.4.

create or preserve a use of property that was inconsistent with uses contemplated by the fee holder.

> Hawaiian history has proven that the scope of native tenants' rights is significantly more narrow than asserted by appellants. ... [T]he Hawaiian Usage clause does not support the proposition that native tenants possess exclusive use and occupancy rights over kuleana lands they failed to claim. Instead, prior to the Kuleana Act, native tenants remained on the land "at the will of the sovereign or superior, subject always to dispossession and redivision." Ancient custom did not include the right to remain upon and exclude others from the land.

Pai 'Ohana, 1996 WL 44731, *1.

While the decision to reject state law relating to property would appear to fly in the face of *Erie*, it is in fact consistent with decisions of this Court. *Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63 (1966) (federal law will not displace state law absent a significant threat to any identifiable federal interest).

Applying *Wallis*, the Court of Appeals for the Fifth Circuit chose to apply federal common law rather than state common law in a case involving the exercise of eminent domain powers, not withstanding the fact that state laws will normally be applied to questions involving property interests. *Georgia Power Company v. 138.30 Acres of Land*, 617 F.2d 1112 (5th Cir. 1980).

> Basic considerations of federalism, as embodied in the Rules of Decision Act, prompt us to begin with the premise that state law should supply the federal rule unless there is ... a *showing that state law conflicts significantly with any federal interests or policies* present in this case.

Id. at 1115-16 (citing *Wallis*, 384 U.S. at 68 (emphasis added)).

In *Pai 'Ohana*, the Court of Appeals observed that Hawaiian laws protecting native rights of custom do not support the creation of property interests which are incompatible with those

of fee holders.[14] The Hawaiian court, to the contrary, subordinated the rights of fee holders to claimants of native Hawaiian customs. The Ninth Circuit's rejection of the Hawaiian Court's decision in this case was necessary to avoid the very constitutional conflicts sought to be avoided in *Wallis*. Had the Court of Appeals in *Pai 'Ohana* adopted an interpretation of Hawaiian laws as newly defined in this case, property rights of land owners could be abridged by application of Hawaiian custom to such a degree as to constitute a taking in violation of the Fifth and Fourteenth Amendments to the United States Constitution. Review should be granted to resolve this conflict.

CONCLUSION

The Hawaiian court seeks to enlarge the rights of native Hawaiians so far beyond all previously defined limits as to make essentially meaningless fundamental notions of property ownership.[15] The Supreme Court of Hawaii seeks to "exempt [itself] from a century of development of the American common law."[16] To the extent that these newly discovered "traditions" extend beyond any limits contemplated by Congress, they violate the Fifth and Fourteenth Amendments, both as to takings and equal protection.

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[14] In *Pai 'Ohana*, the interests asserted were rights of exclusive use and occupancy. *Pai 'Ohana*, 1996 WL 44731, *1.

[15] Perhaps this is intended, given the court's suggestion, "the regulatory power provided in article XII, section 7, does not justify summary extinguishment of such rights by the State merely because they are deemed inconsistent with generally understood elements of the western doctrine of "property." Pet. App. at 37a. However, this intention appears at the very least inconsistent with constitutional committee reports, as cited in *Pai 'Ohana*, which warned that "article XII, section 7 'does not attempt to grant unregulated, abusive and general rights to native Hawaiians ....'" *Pai 'Ohana*, 875 F. Supp at 695.

[16] Pai 'Ohana, 875 F. Supp. at 696.

This case is controlled by two lines of decision of this Court. It has been held that a deprivation of a property interest which implicates the Takings Clause but for which compensation is not provided violates the Fifth and Fourteenth Amendments. Furthermore, a federal court which must otherwise follow state decisional law may not do so where it would conflict significantly with any federal interests. The decision of the Hawaii Supreme Court violates the United States Constitution and is in conflict with both the decisions of this Court as well as inferior Federal Courts and, as such, Nansay's petition should be granted.

DATED: March, 1996.

Respectfully submitted,

* JAMES. S. BURLING
*COUNSEL OF RECORD
STEPHEN E. ABRAHAM
OF COUNSEL
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Amicus Curiae

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No. 95-1159

In The

Supreme Court of the United States

October Term, 1995

NANSAY HAWAII, INC.,

Petitioner,

v.

PUBLIC ACCESS SHORELINE HAWAII AND ANGEL PILAGO,

Respondents.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Hawai'i

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DENISE E. ANTOLINI
Counsel of Record
LEA O. HONG
DAVID L. HENKIN
Sierra Club Legal Defense Fund
223 South King Street
4th Floor
Honolulu, Hawai'i 96813
(808) 599-2436

CARL C. CHRISTENSEN
Native Hawaiian Legal Corporation
1164 Bishop Street
Suite 1205
Honolulu, Hawai'i 96813
(808) 521-2302

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED FOR REVIEW

Is Petitioner's constitutional challenge unripe for review where there has been no final decision on Petitioner's application for a Special Management Area Use Permit because the Hawai'i Supreme Court remanded to the county administrative agency for an evidentiary hearing on Petitioner's permit application?

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STATEMENT OF JURISDICTION

The United States Supreme Court lacks jurisdiction to review the Hawai'i Supreme Court's August 31, 1995 opinion and September 20, 1995 judgment since the Hawai'i Supreme Court's decision is not "final" within the meaning of 28 U.S.C. § 1257(a). Respondents will discuss this jurisdictional bar in their analysis of the reasons for denying the writ, *infra*.

STATEMENT OF THE CASE

Respondents will not duplicate the factual and procedural summaries provided by the Hawai'i Supreme Court in *Public Access Shoreline Hawai'i and Pilago v. Hawai'i County Planning Comm'n*, 903 P.2d 1246, 1250-51 (Haw. 1995) (hereinafter *PASH/Pilago II*), Petitioner's Appendix ("App.") at 3a-7a, and the Hawai'i Intermediate Court of Appeals in *Public Access Shoreline Hawai'i and Pilago v. Hawai'i County Planning Comm'n*, 900 P.2d 1313, 1315-19 (Haw. Ct. App. 1993) (hereinafter *PASH/Pilago I*), App. at 66a-74a. Rather, Respondents will highlight two major factual omissions and misstatements in the Petition.

First, Petitioner's mantra of unconstitutional "takings" cannot alter one simple fact – the Hawai'i Supreme Court's decision did not "take" anything from Petitioner. The court merely required a new administrative hearing. It found that Respondent Public Access Shoreline Hawai'i ("PASH") has standing to request and participate in an administrative hearing ("contested case") before the

Hawai'i County Planning Commission ("HPC") regarding Petitioner's application for a Special Management Area Use ("SMA") permit under Hawai'i's Coastal Zone Management Act, Hawai'i Revised Statutes Chapter 205A. *PASH/Pilago II*, 903 P.2d at 1255-56, App. 17a-18a.[1] The court did *not* deny Petitioner a permit to develop its property. The court did *not* require Petitioner to allow persons onto its land as a condition of a permit. The court did *not* deny Petitioner a further hearing.

Second, Petitioner's claim that the Hawai'i Supreme Court's interpretation of Hawaiian customary rights is an "unwarranted" declaration of a "pretextual custom," Petition, at 12, ignores the unique role that custom has long played in the development of Hawaiian property law. Judicial recognition that customary rights have legal effect is well established in Hawai'i. In its first written laws, dating from the 19th century, the Kingdom of Hawai'i recognized the continued vitality of Hawaiian custom.[2] The continuing force of Hawaiian custom is reflected in the form of Article XII, Section 7 of the Hawai'i Constitution and Section 1-1 of the Hawai'i

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[1] In support of its request for a contested case, PASH, an environmental public interest association, asserted that a Hawaiian member of PASH and his family exercise constitutionally-protected traditional and customary rights of gathering 'ōpae 'ula and 'ōpae lōlō (shrimp) in anchialine (brackish) ponds located on the Petitioner's property and that the Petitioner's resort development threatens the exercise of these rights. *PASH/Pilago I*, 900 P.2d at 1318, App. at 73a-74a.

[2] The Hawai'i Supreme Court canvassed and analyzed many of these early laws. *See, e.g., PASH/Pilago II*, 903 P.2d at 1258 n.21, 1261 n.24, 1262 n.27, 1267 n.35, 1269, App. at 24a n.21, 31a n.24, 34a n.27, 47a n.35, 53a.

Revised Statutes (1993 Repl.). Petitioner's cursory recitation of facts fails to come to terms with the Hawai'i Supreme Court's extensive discussion of the unique history and origins of these laws. *PASH/Pilago II*, 903 P.2d at 1258-71, App. 23a-57a.

REASONS FOR DENYING THE WRIT

The fatal flaw in the Petition for a Writ of Certiorari is that this case is simply not sufficiently final or ripe for this Court's review. Contrary to Petitioner's characterization, the Hawai'i Supreme Court's decision did not rise to the level of a taking of private property without due process of law. Rather, the decision merely acknowledges that, when customary practices are threatened by private land development of a coastal area, native Hawaiians who allege a tradition and custom of gathering there have standing to obtain an administrative hearing where they can assert those rights. Whether the future administrative hearing required by the court in this case will result in any conditions on Petitioner's development and whether any such conditions might result in an unconstitutional taking are questions that cannot be answered until the hearing and state appeals, if any, are completed. Granting certiorari now, before state administrative and judicial proceedings are completed, would not only waste this Court's limited resources but would also exceed this Court's jurisdiction under 28 U.S.C. § 1257(a).

Moreover, Petitioner's claim that the decision of the Hawai'i Supreme Court constituted a violation of due

process does not stand up under scrutiny.[3] The Hawai'i Supreme Court's detailed discussion of the unique role of custom in the development of state property law amply demonstrates that the court's determination that Respondents are entitled to a contested case is firmly rooted in the background principles of state law. In addition, the court's remand to the HPC for a future evidentiary hearing guarantees that Petitioner will have ample opportunities to challenge Respondents' claims to customary rights. These three central issues – finality, ripeness and customary law – are discussed in Sections I, II and III below.

I. THIS COURT LACKS JURISDICTION TO REVIEW THE JUDGMENT OF THE HAWAI'I SUPREME COURT SINCE IT IS NOT "FINAL" WITHIN THE MEANING OF 28 U.S.C. § 1257(a).

This Court must deny the writ of certiorari in this case since it lacks jurisdiction to review the Hawai'i

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[3] Respondents note that, to the extent that Petitioner is attempting to raise a due process violation distinct from the alleged judicial taking, Petitioner did not make any such claim below. Review of the petition to the Hawai'i Supreme Court and Petitioner's *five* supplemental briefs to that court reveals that, although Petitioner may have used the term "due process" in passing, it never raised a due process claim independent of its takings claim. It is virtually axiomatic that this Court will not consider a question to meet the "important federal question" requirement necessary to invoke this Court's jurisdiction when the question was not properly raised in the state court proceedings. *See Illinois v. Gates*, 462 U.S. 213, 218-20 (1983); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-35 (1940).

Supreme Court's judgment. 28 U.S.C. § 1257(a) authorizes Supreme Court review only of "*final* judgments or decrees rendered by the highest court of a State in which a decision could be had. . . . " (Emphasis added). This limitation on Supreme Court jurisdiction dates back to the Judiciary Act of 1789 and serves several important purposes:

> (1) it avoids piecemeal review of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real "case" or "controversy" in the sense of Art. III; (3) it limits review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs.

North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc., 414 U.S. 156, 159 (1973).

Insisting on finality is particularly important when a constitutional challenge attacks "a State court's decision on matters peculiarly of local concern." *Republic Natural Gas Co. v. Oklahoma* (hereinafter *Republic*), 334 U.S. 62, 67 (1948). Here, Petitioner challenges Hawai'i's interpretation of its own law of real property, a domain that the federal Constitution generally leaves "to the individual States to develop and administer." *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 484 (1988) (*quoting Hughes v. Washington*, 389 U.S. 290, 295 (1967) (Stewart, J., concurring)).

In this case, the Hawai'i Supreme Court has not reached a final decision regarding the applicability of federal "takings" law to any custom-based limitations

that may (or may not) be imposed on Petitioner's activities at Kohanaiki.[4] The court simply held that PASH's allegations were sufficient to establish its standing to request and participate in a contested case. *PASH/Pilago II*, 903 P.2d at 1255-56, App. at 17a-18a. The court then remanded to the HPC for further administrative hearings to determine, among other things, (1) the validity of Respondents' claims to traditional and customary practices at Kohanaiki, (2) the impact, if any, of Petitioner's proposed development on the reasonable exercise of any traditional and customary practices that Respondents establish, and (3) the reasonable conditions, if any, that might be imposed upon Petitioner's permit to protect such practices.

The Hawai'i Supreme Court's instructions on remand to the HPC highlight the lack of finality in this case:

> In the instant case, the HPC must consider PASH's *alleged customary rights* on remand . . . *[I]f* such rights are established, the HPC will be obligated to protect them *to the extent possible*. This *may* involve the placement of conditions on Nansay's permit to develop land. *No determination as to the extent of any applicable limitations on Nansay's ability to develop its land may be made until the HPC holds a contested case hearing in accordance with this opinion*.

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[4] Petitioner's proposed project is located in the ahupua'a of Kohanaiki. An "ahupua'a" is a traditional Hawaiian land division usually extending from the mountains to the sea along ridges or other natural characteristics. *PASH/Pilago II*, 903 P.2d at 1250 n.1, App. at 4a n.1.

Id. at 1273, App. at 62a (emphasis added). Of course, following the contested case, Petitioner will be free to challenge in court the HPC's ultimate decision on the SMA permit application.

Since further state administrative and judicial proceedings may very well dispose of Petitioner's constitutional claims, the Hawai'i Supreme Court's decision is not "final" for purposes of 28 U.S.C. § 1257(a). *See Republic*, 334 U.S. at 71. The fact that further proceedings on remand to the HPC are needed to remove factual ambiguities that preclude an informed judgment on Petitioner's constitutional claims underscores this lack of finality.[5] *See Minnick v. California Dept. of Corrections*, 452 U.S. 105 (1981). Moreover, this case does not fall within any of the narrow exceptions to the finality requirement recognized in *Cox Broadcasting Corp. v. Cohn* (hereinafter *Cox*), 420 U.S. 469 (1975).[6] Accordingly, this Court lacks jurisdiction to entertain Petitioner's claims.

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[5] In addition to the uncertainty over the nature and extent of the custom-based limitations, if any, that may be imposed on Petitioner's activities, the ownership of the anchialine ponds at issue is in doubt. The State of Hawai'i asserts title to these ponds as "public trust" lands because they are submerged and affected by the tides. *PASH/Pilago II*, 903 P.2d at 1257 n.20, App. at 22a n.20.

[6] As an initial matter, the outcome of the further state proceedings that the Hawai'i Supreme Court has ordered is far from "preordained." *Cox*, 420 U.S. at 479. The HPC might reject Respondents' claims to customary rights at Kohanaiki; it might recognize such rights but find that limitations on Petitioner's development plans are either unnecessary or infeasible; or it might impose limitations that Petitioner finds acceptable. In any of these cases, Petitioner's federal claims would not "survive and require decision regardless of the outcome of future [state] proceedings." *Cox*, 420 U.S. at 480. Moreover, following the

II. PETITIONER'S TAKINGS CLAIM IS NOT RIPE.

The jurisdictional requirement that a state court judgment be "final" before this Court can grant review, discussed *supra*, is one component of the broader ripeness doctrine. In *Abbott Laboratories, Inc. v. Gardner*, 387 U.S. 136 (1967), this Court explained that, to determine whether a case is ripe, a court must evaluate several factors, including the finality of the government action at issue. *Id.* at 149. Since, in this case, the Hawai'i Supreme Court's order remanding to the HPC does not constitute a final decision on Petitioner's permit application, Petitioner's challenge to that decision necessarily fails to satisfy the ripeness test.

In the landmark case of *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), this Court confirmed that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a *final decision* regarding the application of the regulations to the

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contested case proceedings, Petitioner will have ample opportunity – in state court and before this Court – to challenge on constitutional grounds any limitations the HPC may impose on Petitioner's development plans. *See id.* at 481-82. Finally, refusal immediately to review the Hawai'i Supreme Court's decision would not "seriously erode federal policy." *Id.* at 483. On the contrary, as noted above, the federal Constitution generally leaves to the States the development and administration of the law of real property. Indeed, intervention by this Court now, before Hawai'i has had an opportunity to strike the balance between customary rights and modern development, would constitute a serious and unnecessary intrusion on State prerogatives.

property at issue." *Id.* at 186 (emphasis added). After all, "until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question," a court simply cannot evaluate the key factors in the takings inquiry: "the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations." *Id.* at 191.

Since the HPC has not taken any final action on Petitioner's application for a SMA permit, it is clear that any claim of regulatory taking is hopelessly premature. Petitioner concedes as much. *See* Petition, at 25 n.13 ("Petitioner has never made a regulatory takings claim."); Nansay's Haw. S. Ct. Second Supplemental Brief, App. at 146a. Nonetheless, even though no conditions have been placed on the development of Petitioner's lands, Petitioner insists that the Hawai'i Supreme Court's decision has somehow "transformed native Hawaiian gathering rights into a *permanent* physical occupation of land, thus amounting to a compensable taking." Petition at 23 (emphasis in original). However, the procedural posture of this case belies Petitioner's claim; at this stage, Petitioner's permit application has neither been denied nor conditioned in any way.

This case is not, as Petitioner asserts, "analytically indistinguishable" from *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). Petition, at 23. In *Nollan*, the takings issue was ripe for this Court's consideration since the California Coastal Commission had reached a final determination conditioning the approval of a coastal development permit on the Nollans' willingness to grant the public an easement across a portion of their property.

483 U.S. at 828. In contrast, in the present case, the HPC has not yet had a chance to determine whether any conditions will be imposed on Petitioner's development plans.

The fact that Hawai'i has not required Petitioner to grant access to anyone also distinguishes the physical occupation cases cited by Petitioner. Petitioner itself quotes *Yee v. City of Escondido*, 503 U.S. 519 (1992), where this Court stressed that "[t]he government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of its land." Petition at 23 (*quoting Yee*, 503 U.S. at 527) (emphasis in *Yee*). In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), New York's requirement that landlords allow television cable companies to emplace cable facilities in their apartment buildings was a minor, but real, physical intrusion. In contrast, no physical invasion of Petitioner's property has been authorized at this time by the Hawai'i court's decision.

Petitioner's preemptive strike on the principles expressed in the Hawai'i Supreme Court's decision most closely resembles the failed claims advanced by the private landowners in *Robinson v. Ariyoshi*, 887 F.2d 215 (9th Cir. 1989).[7] In *Robinson*, a sugar plantation claimed that a

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[7] The *Robinson* case had a long history in the federal court system. The original district court judgment, 441 F. Supp. 559 (D. Haw. 1977), was affirmed by the Ninth Circuit at 753 F.2d 1468 (9th Cir. 1985). This Court then vacated the Ninth Circuit's judgment and remanded for further consideration in light of *Williamson County*, 477 U.S. 902 (1986). The district court confirmed its prior ruling at 676 F. Supp. 1002 (D. Haw. 1987). However, as discussed, *infra*, the Ninth Circuit vacated the district court's opinion on the grounds that the case was not ripe and remanded with instructions to dismiss. 887 F.2d at 216.

Hawai'i Supreme Court decision recognizing the English common law doctrine of riparian rights had reversed settled principles of state water law, resulting in an unconstitutional taking of its vested rights to collect and transport water out of the watershed. In analyzing the landowners' claim, the Ninth Circuit looked to this Court's decision in *Williamson County*, which "affirmed the principle that the ripeness of a takings claim turns on whether the government entity charged with a taking has reached a final decision as to the property interest in question." *Id.* at 218. Since, "[t]o date, the State ha[d] not interfered in any way with the parties' use or diversions of the waters [they claimed]," the Ninth Circuit determined that the case was not ripe for review. *Id.* at 219.

In arriving at its decision, the *Robinson* court rejected the landowners' argument that their claim was "analogous to a physical takings claim." *Id.* The court observed that:

> [i]n the case of a physical invasion, the extent of the injury is known at the moment of the invasion. Further, the property owner incurs actual injury even if the government subsequently rescinds its action.

Id. In contrast, since Hawai'i's courts had never finally adjudicated the landowners' rights to the water they claimed, there was no way for the court to determine "the extent of the injury suffered by the private owners." *Id.*

Petitioner's claim of an unconstitutional judicial taking in this case is similarly unripe for review. Even accepting *arguendo* that the Hawai'i Supreme Court's

decision radically departed from prior state law on customary rights[8] and further assuming that judicial decisions can violate the Takings Clause,[9] the Hawai'i Supreme Court's judgment has not "interfered in any way" with Petitioner's use of its land. *Robinson*, 887 F.2d at 219. The decision presently imposes no restrictions on Petitioner's development plans and, thus, has not, as Petitioner alleges, "coerced the impressment of an easement" on Petitioner's property at Kohanaiki. Petition at 23. Petitioner has not suffered any quantifiable injury or physical invasion as a result of the Hawai'i Supreme Court's remand to the HPC for further proceedings. Accordingly, at this point, this Court simply cannot evaluate the traditional factors for judging whether an unconstitutional taking has occurred. *Williamson County*, 473 U.S. at 191.

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[8] Of course, Respondents do not concede this point. *See, infra*, Part III.B.

[9] Respondents note that the judicial takings theory is "by no means a settled issue of law." *Corporation of Presiding Bishop v. Hodel*, 830 F.2d 374, 381 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1015 (1988). In the twenty-nine years since Justice Stewart first suggested this theory in his concurrence in *Hughes v. Washington*, 389 U.S. at 296-97, this Court has never relied on the judicial takings theory to decide a case. *See, e.g., Bonelli Cattle Co. v. State of Arizona*, 414 U.S. 313, 331 (1973) (judicial takings issue "a question which we find unnecessary to decide on our view of the case"), *overruled on other grounds, Oregon v. Corvallis Sand & Gravel Co.*, 420 U.S. 363 (1977). Since Petitioner's claims here are undeniably unripe, this case does not present a proper forum for this Court to consider this unsettled legal issue.

III. THE HAWAI'I SUPREME COURT'S ANALYSIS OF CUSTOMARY RIGHTS DID NOT DEPRIVE PETITIONER OF DUE PROCESS.

Petitioner's claim that the Hawai'i Supreme Court decision deprives it of due process of law should be rejected for at least two reasons. First, the court's decision remanding for further administrative hearings ensures that Petitioner can raise its due process claims at a later date. *See* Section A, *infra.* Second, Petitioner was not denied due process where, as here, the Hawai'i Supreme Court merely applied "background principles" of Hawai'i's unique property law. *See* Section B, *infra.*

A. The Hawai'i Supreme Court's Decision Ensures Ample Opportunities for Petitioner To Challenge Respondents' Claims to Customary Rights.

Petitioner will have plenty of process before limitations on the use of its property, if any, are imposed. Petitioner's situation is readily distinguishable from that of the plaintiffs in *Stevens v. City of Cannon Beach,* 854 P.2d 449 (Or. 1993), *cert. denied,* 114 S. Ct. 1332 (1994), where this was a concern to some members of the Court. In *Stevens,* the plaintiffs' application for a building permit to construct a seawall on the dry-sand portion of their property was denied based on customary use of the Oregon shore. Two of the justices of this Court favored granting certiorari on due process grounds since, before the permit application was denied, plaintiffs had not been afforded any "opportunity to make out their constitutional claim

by demonstrating that the asserted custom [was] pretextual." 114 S. Ct. at 1336 (Scalia, J., dissenting).

In contrast, before any final decision is made on Petitioner's SMA permit application, Petitioner will have ample opportunity to challenge the validity and extent of Respondents' claimed access rights at Kohanaiki. As the Hawai'i Supreme Court stressed, " '[o]pportunities shall be afforded all parties to present evidence and argument on all issues involved' in the contested case hearing held on remand." *PASH/Pilago II*, 903 P.2d at 1255-56, App. at 18a (*quoting* Haw. Rev. Stat. § 91-9(c) (1985 Repl.)). The Hawai'i Supreme Court clearly did not deprive Petitioner of due process by remanding to the HPC for yet *more* process.[10]

B. The Hawai'i Supreme Court Properly Applied Background Principles of Hawai'i Property Law.

In concluding that a contested case is required to allow Respondents to prove their customary usage of Petitioner's land, the Hawai'i Supreme Court did not

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[10] In addition, Petitioner has already had an opportunity to state its case regarding the proper scope of customary rights in Hawai'i. Upon granting certiorari, the Hawai'i Supreme Court invited all parties to submit supplemental briefs addressing Petitioner's claim that protecting native Hawaiian rights on land proposed for development implicates the Takings Clause. *See PASH/Pilago II*, 903 P.2d at 1256, App. at 18a n.16. While Petitioner may disagree with the state court's resolution of that issue, Petitioner cannot complain that it has been deprived of its day in court.

invent new law, but merely applied pre-existing principles of this State's unique property law. In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), this Court explained that there can be no violation of the Takings clause if the "background principles of the State's law of property and nuisance" reveal that the challenged restrictions on land use "inhere in the [landowner's] title itself." *Id.* at 1029. *See also id.* at 1027 (no compensable taking if "proscribed use interests were not part of [owner's] title to begin with"); *id.* at 1028-29 ("we assuredly *would* permit the government to assert a permanent easement that was a preexisting limitation upon the landowner's title") (emphasis in original). The Hawai'i Supreme Court followed the *Lucas* court's guidance and extensively reviewed the central role of customary practices in the development of Hawaiian property law before concluding that Respondents are entitled to a contested case to challenge Petitioner's SMA permit application. Since Petitioner's claimed right to exclude a broad class of native Hawaiian gatherers was never a part of the "bundle of rights" it acquired with the title to its land at Kohanaiki, the Hawai'i Supreme Court could not have deprived Petitioner of any due process by simply acknowledging that fact.

Significantly, Petitioner is unable to point to any conflict between the Hawai'i Supreme Court's analysis of custom-based restrictions on land use and the ruling of any other state supreme court or federal court. On the contrary, Petitioner's own discussion demonstrates that American courts have embraced custom as a legitimate source of property law for more than two hundred years. Petition, at 20 n.10. This Court itself has long recognized

custom as creating legally cognizable property rights where the *bona fides* of the custom can be proven. *See, e.g., Cariño v. Insular Government of the Philippine Islands*, 212 U.S. 449 (1909) (recognizing Philippine Islands tribesman's ownership of land "in accordance with Igorot custom").

Petitioner's insistence that it possesses a near-absolute "right to exclude" native Hawaiian gatherers from its land ignores Hawai'i's unique status as the only state whose legal system evolved directly from that of a non-Western political entity, the Polynesian kingdom founded by Kamehameha I in the early Nineteenth Century. For more than one hundred fifty years, Hawai'i statutes have recognized custom-based limitations on the common law, *PASH/Pilago II*, 903 P.2d at 1258 n.21, App. at 24a n.21, and the constitution of the State of Hawai'i continues to affirm custom's important role today, Haw. Const. art. XII, § 7. *See also* Haw. Rev. Stat. § 1-1 (1993 Repl.). As the Hawai'i Supreme Court observed at the turn of this century:

> The New Englanders who early settled here did not come as a colony or take possession of these islands or bring their body of laws with them, though they exercised a potent influence upon the growth of law and government. The ancient laws of the Hawaiians were gradually displaced, modified and added to. The common law was not formally adopted until 1893 and then *subject to* judicial precedents and *Hawaiian national usage*.

Branca v. Makuakane, 13 Haw. 499, 504-05 (1901) (emphasis added).

Soon after the annexation of Hawai'i, this Court confirmed the validity of Hawaiian property concepts that, although unknown on the Mainland, are firmly rooted in Hawai'i's unique history and culture. In *Damon v. Territory of Hawai'i*, 194 U.S. 154 (1904), the plaintiff claimed ancient fishing rights over a fishing ground. *Id.* at 158 (plaintiff alleged right "to set apart one species of fish to the owner's sole use, or, alternatively to put a taboo on all fishing within the limits for certain months and to receive from all fisherman one-third of the fish taken upon the fishing grounds"). Justice Holmes, writing for the Court, observed that "[a] right of this sort is somewhat different from those familiar to the common law, but it seems to be well known to Hawaii. . . . " *Id.* While the asserted Hawaiian property right may have appeared "anomalous" to the Justices, the *Damon* Court affirmed that, since plaintiff's claim was firmly grounded in Hawaiian law, "there is nothing for the courts to do except to recognize it as a right." *Id.* (citation omitted).

In *Boquillas Land & Cattle Co. v. Curtis*, 213 U.S. 339 (1909), this Court recognized that New Mexico's adoption of the common law of England "is far from meaning that patentees of a ranch on the San Pedro are to have the same rights as owners of an estate on the Thames." *Id.* at 345. Similarly, as *Damon* suggests, Petitioner should not assume that the bundle of property rights it holds in Hawai'i should be identical to those of a landowner in Massachusetts, California, or eighteenth-century England. While Petitioner may disagree with the Hawai'i Supreme Court's conclusions regarding the scope of customary rights under state law, the Hawai'i court's extensive analysis of Hawaiian custom and tradition is fully

consistent with this Court's rulings in similar cases and disproves Petitioner's claim that the court's analysis was "pretextual." Petition, at 12.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be DENIED.

Respectfully submitted,

DENISE E. ANTOLINI,
Counsel of Record
LEA O. HONG
DAVID L. HENKIN
Sierra Club Legal Defense Fund
223 South King Street, 4th Floor
Honolulu, Hawai'i 96813
(808) 599-2436

CARL C. CHRISTENSEN
Native Hawaiian Legal Corporation
1164 Bishop Street, Suite 1205
Honolulu, Hawai'i 96813
(808) 521-2302

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In The

Supreme Court of the United States

October Term, 1995

NANSAY HAWAII, INC.,

Petitioner,

vs.

PUBLIC ACCESS SHORELINE HAWAII,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Hawaii

BRIEF OF THE STATE OF HAWAII AS AMICUS CURIAE IN OPPOSITION TO THE PETITION FOR CERTIORARI

MARGERY S. BRONSTER
Attorney General
State of Hawaii

STEVEN S. MICHAELS*
Deputy Attorney General
State of Hawaii
**Counsel of Record*

Department of the
Attorney General
425 Queen Street
Honolulu, Hawai'i 96813
(808) 586-1383

Counsel for the
State of Hawaii

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Whether, where a private landowner's land use permit is vacated and remanded by the state courts for further proceedings so that a county planning agency may, upon a full evidentiary record, consider ways that the landowner's proposed extensive hotel, golf course, and resort complex can accommodate native Hawaiian gathering rights tracing their origins to reservations in the original land grants by the Kingdom of Hawaii, this Court lacks jurisdiction for want of a "final judgment," or, alternatively, there is no "ripe" claim for federal judicial relief, with respect to the landowner's claim that the state courts have violated substantive Due Process or inflicted a "physical occupation" taking in violation of the Just Compensation Clause?

2. Whether, even if Petitioner has presented a ripe case for this Court's review, the Supreme Court of Hawaii's preliminary guidance concerning the scope of native Hawaiian gathering rights in the context of this case constitutes a denial of substantive Due Process or an uncompensated taking of private property for public use in violation of the federal Constitution?

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INTEREST OF THE AMICUS CURIAE

Petition Nansay, Hawaii, Inc., has attacked, as a breach of substantive Due Process, and as an uncompensated judicial "taking" by "physical occupation," the Hawaii Supreme Court's construction of certain state constitutional provisions and state statutes that bear on the gathering rights of native Hawaiians – descendants of the original inhabitants of Hawaii. For this reason, the State of Hawaii has an interest in this case, and, through its Attorney General, submits this amicus curiae brief.

STATEMENT OF THE CASE

1. In response to passage of the federal Coastal Zone Management Act of 1972, 16 U.S.C. §§ 1451-64 (1991), the Hawaii legislature enacted Chapter 205A, Hawaii Revised Statutes, which declared it the policy of the State "to preserve, protect, and where possible, to restore the natural resources of the coastal zone of Hawaii." Haw. Rev. Stat. § 205A-21 (1993). *See Mahuiki v. Planning Commission*, 65 Haw. 506, 517, 654 P.2d 874, 881 (1982). The statute achieves this purpose by delegating to each of Hawaii's four counties the tasks of (1) establishing Special Management Areas ("SMAs") along the shoreline, and (2) reviewing requests for "use permits" allowing development within an SMA. *See* Haw. Rev. Stat. §§ 205A-23, 205A-28, 205A-29 (1993). The law requires that, in consultation with the Office of State Planning (a state agency), the delegated "authority in each county . . . shall adopt rules under chapter 91[, Haw. Rev. Stat., the Hawaii Administrative Procedure Act,] setting the special management area use permit application procedures, conditions under which hearings must be held, and the time periods within which the hearing and action for special management area use permits shall occur." *Id.* § 205A-29. These rules must in turn "comply with the

objectives and policies" of Chapter 205A (*id.* § 205A-5), and no development may be permitted in the SMA unless the county "has first found," among other things, "[t]hat the development is consistent with the objectives, policies, and special management area guidelines of this chapter[.]" *Id.* § 205A-26(2)(B). The "guidelines" state that "developoment in the special management area shall be subject to reasonable terms and conditions set by the [county] authority in order to ensure . . . [a]dequate access, by dedication or other means, to publicly owned or used beaches, recreation areas, and natural reserves is provided to the extent consistent with sound conservation principles." *Id.* § 205A-26(1)(A). The guidelines also provide that the counties "shall seek to minimize, where reasonable[,] . . . [a]ny development which would reduce or impose restrictions upon public access to tidal and submerged lands, beaches, portions of rivers and streams within the special management areas and the mean high tide line where there is no beach." *Id.* § 205A-26(3)(C).

2. This case arises out of the interaction of the Big Island of Hawaii's ("Hawaii County's") specific procedures for adjudicating SMA use permit requests and the "contested case" provisions of the Hawaii Administrative Procedure Act, Haw. Rev. Stat. §§ 91-1(5), 91-9 - 15 (1993). These latter provisions, which specify the contours of trial-type administrative process in Hawaii,[1] are

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[1] In a Chapter 91 "contested case," participants are entitled to specific notice and opportunity to be heard (Haw. Rev. Stat. § 91-9 (1993)), and to submit evidence and to cross-examine opposing witnesses (*id.* § 91-10). Among other things, state law also prohibits an agency deciding a contested case from considering matters outside the administrative hearing record (*id.* § 91-9(g)), and an agency decision must be backed by findings of fact and conclusions of law that are in turn subject to judicial review in the courts (*id.* §§ 91-12, 91-14, 91-15).

triggered under state law by administrative action "in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for agency hearing." *Id.* § 91-1(5). Contested case hearings can be triggered under state law either by the state or federal Constitution's requirements of procedural Due Process, *see Aguiar v. Hawaii Housing Authority*, 55 Haw. 478, 496, 498, 522 P.2d 1255, 1265, 1268 (1974), or by statutes or administrative rules that provide for administrative hearings. *See Pele Defense Fund v. Puna Geothermal Venture*, 77 Haw. 64, 68, 881 P.2d 1210, 1214 (1994). In this case, the state court below construed the local administrative rules of Hawaii County to have conferred hearing rights for all parties with minimal "injury-in-fact" standing when a landowner has applied for an SMA permit. *Public Access Shoreline Hawaii v. Hawaii County Planning Comm'n*, 79 Haw. 435, 432, 903 P.2d 1246, 1253 (1993) ("*PASH II*") (citing cases).

3. In assessing the requirement of "standing," the Hawaii Supreme Court, like this Court, has recognized aesthetic and environmental interests as generally sufficient to confer the ability to challenge land development actions; conversely, the determination that a party has bare "injury-in-fact" standing does not signify that that party has any "property" interest in the land at issue.[2] As

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[2] *Compare Kona Old Hawaiian Trails Group v. Lyman*, 69 Haw. 81, 90, 734 P.2d 161, 167 (1987) ("[I]f the development . . . could result in the loss of access routes to the shoreline or the right to traverse ancient trails, the association's members probably were 'specially, personally and adversely affected' by the administrative decision"), *with Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992) ("[U]nder our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even

confirmed by County rule, standing to participate in an SMA permit proceeding – and the right to demand trial-type procedures – is conferred upon any entity that "can demonstrate that [it] will be so directly and immediately affected by the Commission's decision [that its] interest in the proceeding is clearly distinguishable from that of the general public[.]" Haw. County Admin. R. § 4-2(6). *See Public Access Shoreline Hawaii v. Hawaii Planning Commission*, 79 Haw. 246, 250 n.6, 900 P.2d 1313, 1317 n.6 (App. 1993) ("*PASH I*").

4. In 1990, Petitioner Nansay Hawaii, Inc., applied to the Hawaii County Planning Commission for an SMA use permit to allow Nansay to build an extensive resort complex along the Kona coast consisting of two hotels containing more than 1000 guest rooms, a golf course and clubhouse, in addition to more than seven hundred multiple family or single-family residential units, as well as restaurants, retail shops, an artisan village, and a child care center. *PASH II*, 79 Haw. at 429, 903 P.2d at 1250. The proposed development encompasses more than 450 acres of ecologically and culturally important shoreline area within the SMA on the Big Island. *Id.* Despite these facts, Nansay sought to have its application processed without the protection afforded to interested parties by a contested case proceeding. *Id.* Some individuals, members of Respondent Public Access Shoreline Hawaii ("PASH"), were permitted to adduce evidence of their standing, and testified under oath in opposition to aspects of the proposed development, including its possible effect on tidally-influenced anchialine ponds at Kohanaiki. *PASH I*, 79 Haw. at 251, 900 P.2d at 1318. In this context, PASH's

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though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years.")

spokesmen and member witnesses attempted to show that PASH had standing to request a trial-type hearing as a result of the potential rights that certain PASH members enjoyed as native Hawaiians to gather shrimp from the anchialine ponds to use as bait for subsistence fishing purposes. *Id. See also* Record on Appeal at 1156 (Rothstein testimony: "native Hawaiian fishing and food gathering rights" are matters on which "our members are directly impacted," and that "our members have been engaged in" the "harvesting, maintaining from those ponds" "for decades"). The Commission found, however, that PASH did not have standing, and summarily granted the permit. *PASH II*, 79 Haw. at 430, 903 P.2d at 1250.

5. The claims PASH invoked to distinguish its interest in the permit proceeding derive from unique aspects of Hawaiian land law. As this Court is aware, allodial (non-feudal) title was distributed in Hawaii by King Kamehameha III "during the Great Mahele or royal land division." *Kaiser Aetna v. United States*, 444 U.S. 164, 167 (1980). Under laws authorizing that division, private title did not carry the "full bundle" of rights given with fee simple title under English common law. In particular, the *Principles Adopted by the Board of Commissioners to Quiet Land Title in Their Adjudication of Claims Presented to Them*, Stat. L. Kamehameha III 81 *et seq., reprinted in* II Rev. L. Haw. (1925) (App. 2124 *et seq.*) (*"Land Commission principles"*) state:

> The whole power of the King to confer and convey lands to which private equitable claim now attaches, is reposed in the Commission. What is the nature and extent of that power which the King has bestowed upon this board? It can be no other than his private or feudatory right as an individual participant in the ownership, not his sovereign prerogatives as head of

> the nation. Among these prerogatives which affect lands, are the following:
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> . . . 3rd. To encourage and even to enforce the usufruct of lands for the common good.
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> . . .
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> These prerogatives, powers and duties, His Majesty ought not, and ergo, he cannot surrender. Hence the following confirmations of the board, and the titles consequent upon them must be understood subject to these conditions.

Stat. L. Kamehameha III at 81-84. Under state law, the power "[t]o encourage and even to enforce the usufruct of lands for the common good" is a broad grant that "reserve[d] to the sovereign the right to regulate and allocate water [and other] resources in accord with the needs of the people of the Kingdom." *Reppun v. Board of Water Supply*, 65 Haw. 531, 544, 656 P.2d 56, 66 (1982); *see also Robinson v. Ariyoshi*, 65 Haw. 641, 675, 658 P.2d 287, 311 (1982). Another law, codified at Haw. Rev. Stat. § 1-1 (1993), and which dates to the Hawaiian monarchy, provides that "[t]he common law of England, as ascertained by English and American decisions, is declared to be the common law of the State of Hawaii in all cases, except as otherwise expressly provided by the Constitution or laws of the United States, or by the laws of the State, or fixed by Hawaiian judicial precedent, or established by Hawaiian usage." This law, for many years prior to this case (and, so far as the record shows, prior to Nansay's purchase of its property), had formed the basis for claims of gathering rights, either under principles of English "custom," or under precepts of "Hawaiian judicial precedent" or "Hawaiian usage." *See Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 656 P.2d 745 (1982). It has also been the settled law that ocean-based Hawaiian "fishing rights" (including the incidents necessary to exercise those rights, such as the gathering of bait here) were excepted from "fee

simple" title. *Oni v. Meek*, 2 Haw. 87, 95 (1858) (preemption of "specific" gathering rights not codified in Haw. Rev. Stat. § 7-1 inapplicable to "fishing rights").

6. On PASH's appeal to the state courts, the claims – even though not reduced to a judgment – of Respondent's members were deemed sufficient to distinguish PASH from the public as a whole, and were therefore held to be sufficient to require a contested case hearing. *See PASH I*, 79 Haw. at 253, 900 P.2d at 1320; *PASH II*, 79 Haw. at 452, 903 P.2d at 1273. Nine different state judges, without dissent, rejected Nansay's claim that its permit should be upheld, the supreme court finding it critical that Nansay's and the County's refusal to hold a trial-type hearing "effectively curtailed PASH from developing a complete record" as to the scope of the conditions to be placed upon the permit. *PASH II*, 79 Haw. at 448 n.39, 903 P.2d at 1269 n.39.

7. In its opinion, the Supreme Court of Hawaii also clarified the duty of the Commission on remand. The Court noted that Article XII, § 7 of the Hawaii Constitution provides that "[t]he State . . . shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a[3] tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights." *PASH II*, 79 Haw. at 437, 903 P.2d at 1258. But this mandate, the Court found, warranted "protection" of Hawaiian gathering rights only "to the extent feasible," and only so long as Nansay was not subject to " 'actual harm.' " *Id.* at 450 n.43, 903 P.2d at 1271 n.43 (quoting

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[3] An "ahupuaa" is a unit of land generally running from the mountains to the sea, and constituted the general type of land unit awarded in the Great Mahele. *Kaiser Aetna*, 444 U.S. at 167.

Kalipi, supra, 66 Haw. at 12, 656 P.2d at 752). The Court also stressed that only "non-confrontational aspects of traditional Hawaiian culture" would be entitled to protection, *id.* at 447, 903 P.2d at 1268, and that "rights of access and collection will not necessarily prevent landowners from developing their lands." *Id.* at 450, 903 P.2d at 1271.

8. Against this background, the Supreme Court of Hawaii also provided guidance to the County Commission on a number of unresolved issues bearing on gathering rights. The Court began with its 1982 decision in *Kalipi v. Hawaiian Trust Co.,* 66 Haw. 1, 656 P.2d 745 (1982), which had held, based on specific concessions made by the Plaintiff in that case, that there was " 'an insufficient basis' " in the record there " 'to find that [particular gathering] rights would, or should, accrue to persons who did not reside within the ahupuaa [land district] in which such rights are claimed.' " *PASH II,* 79 Haw. at 439, 903 P.2d at 1260. The Court below pointed to *Kalipi's* broad language to the effect that "[t]he precise nature and scope of the rights retained by § 1-1 would, of course, depend upon the particular circumstances of each case," 66 Haw. at 12, 656 P.2d at 749-50, and noted that, in a case decided a decade after *Kalipi,* the Court had held that native Hawaiian litigants should be permitted to litigate fact-specific claims of customary gathering rights, based on unique evidence of gathering practices in a particular district. *PASH II,* 79 Haw. at 439-40, 903 P.2d at 1250-61 (discussing *Pele Defense Fund v. Paty,* 73 Haw. 578, 837 P.2d 1247 (1992), *cert. denied,* 113 S. Ct. 1277 (1993)). Clarifying its earlier decision in *Oni v. Meek,* 2 Haw. 87 (1858), the Court also held that native Hawaiian litigants should not be foreclosed from establishing, through evidence, traditional and customary practices, and the reasonable exercise thereof, simply because *Oni* had

"rejected one particular claim [the right to pasture horses] based upon an apparently non-traditional practice that had not achieved customary status in the area where the right was asserted." *Id.* at 441, 903 P.2d at 1262. Relying on the *Land Commission Principles*, and the rights preserved by § 1-1, the Court resolved conflicts in prior case law concerning the scope of Hawaiian custom, and held that Hawaiian gathering rights were "sovereign" in nature, and may be asserted "notwithstanding arguable abandonment of a particular site[.]" *Id.* at 450, 903 P.2d at 1270.

9. Although the Court provided this guidance, it stressed that, if a customary right has been factually proved, "access is only *guaranteed* in connection with undeveloped lands," state law "does not *require* the preservation of such lands[.]" 79 Haw. at 451, 903 P.2d at 1272. The mandate below thus means only that "the State," via the County, "does not have the unfettered discretion to regulate the rights of ahupua'a tenants out of existence." *Id.* Nansay was expressly allowed on remand to challenge any and all of PASH's fact-based contentions as to customary usage. *Id.* at 448 n.39, 903 P.2d at 1269 n.39. On this basis the court rejected Nansay's claims that the interlocutory mandate constituted a "judicial" or "regulatory" taking. *Id.* at 451-52, 903 P.2d at 1272-73.

REASONS FOR DENYING THE WRIT

Nansay's Petition does not adduce any "compelling reasons" that justify expenditure of this Court's scarce resources, and should be denied. *See* S. Ct. R. 10. None of the issues presented is ripe, except for perhaps a pure and totally meritless "facial" challenge to an interlocutory order of a state court – an attack that faces "an uphill battle" on an "especially steep" slope. *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 495

(1987). *See also United States v. Salerno*, 481 U.S. 739, 745 (1987). That slope is even steeper, as Nansay's claims, which involve the use of tidally-influenced anchialine ponds along Hawaii's shoreline, are controlled by *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 484 (1988), which, as a federal matter, allocates power in this context unequivocally to the States under the Equal Footing Doctrine. Nansay has given no reason to revisit *Phillips*, nor a single good reason why the state courts' efforts to work through difficult problems of local law should be subject to review in this case. Given this case's posture, moreover, Nansay's federal claims, if granted, would wrongly have this Court *encourage* state courts to generate "procedural injustice" by summarily terminating native rights claims at the behest of private landowners. *Compare Stevens v. City of Cannon Beach*, 114 S. Ct. 1332, 1336 (1994) (Scalia, J., joined by O'Connor, J., dissenting from the denial of review).

A. Nansay's Claims are Not Ripe for Review in this Court.

Section 1257 of Title 28 limits this Court's power to review only "final judgments or decrees" of the state courts of last resort. This limit is especially important when a Petitioner alleges that a state court ruling has "taken" its property for public use without just compensation, or acted in breach of substantive Due Process. For nearly twenty years,[4] this Court has routinely turned

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[4] *See Dolan v. City of Tigard*, 114 S. Ct. 2309, 2315 n.4 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1010-14 & nn.3-4 (1992); *Yee v. City of Escondido*, 503 U.S. 519, 526-32 (1992); *Pennell v. City of San Jose*, 485 U.S. 1, 9-14 (1988); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 311-12 (1987); *FCC v. Florida Power Corp.*, 480 U.S. 245, 250-53 (1987); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340-351 (1986); *Williamson County Regional Planning*

away litigants making such claims when further administrative or judicial proceedings remain to be had, and the state entities (here the state courts) alleged to be responsible for the asserted "taking" or "due process" deprivation have not yet "arrived at a final, definitive position regarding how [they] will apply the [law] at issue to the particular land in question." *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 191 (1985). Indeed, this Court, in 1986, summarily directed the United States Court of Appeals for the Ninth Circuit to reconsider a federal decree striking down certain features of Hawaii state court judgments arising out of similar interpretations, in the context of private rights to fresh surface water, of the very *Land Commission Principles* at issue in this case. *See Ariyoshi v. Robinson*, 477 U.S. 902 (1986), *action dismissed on remand*, 887 F.2d 215 (9th Cir. 1989). Although such a summary disposition does not bind the Court as fully as an opinion issued after plenary review, the fact that granting the Petition here would sharply conflict with this Court's own action in a highly analogous case from Hawaii is a factor that counsels strongly against granting review.[5]

Comm'n v. Hamilton Bank, 473 U.S. 172-190 (1985); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 (1981); *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 631-32 & n.12 (1981); *Agins v. Tiburon*, 447 U.S. 255, 260 (1980); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 112-15 & n.13, 137-38 & n.34 (1978).

[5] In the *Robinson* litigation, the Ninth Circuit Court of Appeals held that there is no basis for federal jurisdiction of any kind to assert a taking or substantive Due Process claim when, in a proceeding in the nature of a quiet-title action, the state courts have yet to render a "final judgment," with "the certainty of res judicata, or the effect of collateral estoppel," actually apportioning the property at issue. 887 F.2d at 219. The Ninth Circuit so ruled even though assertedly revolutionary rulings of the state court "would bind lower courts in future litigation," and "placed a cloud on the title of the various private owners."

Petitioner concedes, as it did below, that the finality doctrine prohibits review of any claim that the Hawaii Supreme Court has inflicted a "regulatory taking," but asserts review should still be granted because Petitioner has made a "judicial taking" and a "physical occupation" claim. Neither claim raises any convincing, let alone, compelling reason for granting review.

First, even if state courts could *ever* be deemed to "take" property for public use by declaring the law in property cases, there is no reason to treat such claims of "judicial" taking with greater solicitude – and a less stringent ripeness requirement – than claims that attack "regulatory" actions of nonjudicial officials. Indeed, to accept Nansay's approach would turn the precepts of federalism and respect for the state courts on their head. It therefore must be the law that the same ripeness rules that bar Petitioner's regulatory taking claim also bar Nansay's claim of "judicial" taking. Because Nansay concedes it may "not present here" "a regulatory takings claim" (Pet. at 25 n.13), it follows that, at a minimum, the effects of the state supreme court's guidance concerning the effect of native Hawaiian gathering rights on the development conditions that may be inserted into Nansay's SMA use permit are not properly on review here.

Indeed, Nansay's invocation of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), only confirms this. In *Lucas*, the Court held that state regulation "that deprives land of all economically beneficial use" cannot

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Id. Rather than resolve a conflict in the courts, the instant Petition seeks to create conflict on the federal ripeness requirement – one which is itself highly dependent on state law analysis. Even before considering whether there has been colorable disobedience of federal law by the state supreme court below, the Court should view the agreement of the Supreme Court of Hawaii, and the Ninth Circuit, on the requirements for a justiciable controversy in this context, as a factor strongly weighing against certiorari.

be sustained under the Taking Clause, without the payment of compensation, merely by an " *'ipse dixit'* " to the effect that what previously was " 'private property' " is now " 'public.' " *Id.* at 1031 (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980)). Yet, even assuming, arguendo, that (1) this language applies to "judicial taking" claims; (2) Nansay has shown an *"ipse dixit"*; and (3) Nansay has also shown a deprivation of "all economically beneficial use" of its land (none of which assumptions hold true), *Lucas* confirms that a litigant must have "obtained a final decision regarding how [he] will be allowed to develop [his] property," before he is "entitled to a definitive adjudication of his takings claim in this Court." *Id.* at 1011 (quoting *Williamson County*, 473 U.S. at 190). If the "judicial taking" theory is a valid constitutional basis at all for challenging state court decisions elaborating state law rules of property, *Williamson County* applies in full force to claims made under that theory. And here, of course, far from "shrugg[ing] off the possibility of further administrative and trial proceedings," *Lucas*, 505 U.S. at 1011, the state courts have granted Nansay every opportunity to show that it would be "harmed" by including certain gathering rights in its SMA permit, or, more important, that PASH's claims are factually baseless to begin with.

Nor can Nansay urge there has been a "temporary" taking of its land. For it is the essence of the *Williamson County* ripeness doctrine that delays in obtaining development permits due to a landowner's failure to comply with existing procedural mandates are not takings, but, rather, are the "inevitable cost of doing business in a highly regulated society." 473 U.S. at 204 (Stevens, J., concurring in the judgment). A ripe case is not shown by mere complaints of "expense and disruption," and "protracted adjudicatory proceedings," *FTC v. Standard Oil Co.*, 449 U.S. 232, 243-44 (1980), *cited with approval*, *Williamson County*, 473 U.S. at 192. Nansay does not, and cannot, say that its applications for protection against

native gatherers "would be futile[.]" *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 353 n.8 (1986). Rather, "a meaningful application [by Nansay] has yet to be made." *Id.*

Nansay does not deny that it has correctly been adjudicated to have wrongly attempted to expedite its permit application through a flawed procedure, "except to the extent Public Access's purported standing is based on its members having legal interests in Nansay's land as a result of the Supreme Court's opinion." Pet. at 10-11. The answer here is that the opinion in *PASH II* does not give – at least not without further proceedings – any new present (or future) posessory interests in the land at issue. As the Ninth Circuit has held in construing *PASH II* in a related context, "the Hawaiian Usage clause does not support the proposition that native tenants possess exclusive use and occupancy rights over kuleana lands they failed to claim." *Pai 'Ohana v. United States*, No. 95-15202 (9th Cir. Feb. 2, 1996). In fact, *PASH II* holds only that customary rights in Hawaii are factual in nature, and PASH has the right to adduce the pertinent facts. Rather than create a ripe issue Nansay may invoke, the decision below simply avoids the "procedural injustice" that would have accrued against PASH had its members' claims been terminated without a full hearing. There is no basis for finding fault with that. *See Stevens v. City of Cannon Beach*, 114 S. Ct. 1332, 1336 (1994) (Scalia, J., joined by O'Connor J., dissenting from denial of review). *See generally Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) (arbitrary termination of statutory claim).

Nansay also argues that review should be granted because it "must suffer the now permanent entrance onto and occupation of its property of an enlarged class of native Hawaiian gatherers," and, hence, there has been ordered an uncompensated physical occupation of its land. Pet. at 25 n.13. This is not so. Not only is any "occupation" by native gatherers at worst only temporary in nature; it is an occupation that Nansay itself caused by

failing to comply with state procedure. Nansay has never been barred from precipitating a ripe decision from the Planning Commission; nor, more importantly, has Nansay ever been barred from initiating a trespass or ejectment action in the state courts, in which the unadjudicated factual claims of custom could be decided in advance of a Commission ruling. Nansay, in many fora, could put PASH to its proof, and assert alternatively that it is "harmed" by PASH's access (say, by a depression in land value), or that PASH's prima facie claim is groundless. Nansay could also invoke recognized state-law defenses to the assertion of rights arising out of the *Land Commission Principles*. These include the defenses of "public use" (*i.e.*, that the interference with Nansay's interest is preventing job creation, resource preservation, or other public good), "laches" (*i.e.*, long and prejudicial delay in assertion of the "usufruct" of the land), and "estoppel" (*i.e.*, "manifest injustice" would be perpetrated by assertion of the public right at this time). *See Reppun v. Board of Water Supply*, 65 Haw. 531, 557 & n.18, 560 & nn. 20-22, 562 & n.24, 656 P.2d 56, 74 & n.18, 76 & nn. 10-22, 77 & n.24 (1982). In light of these defenses, even if what Nansay argues about Hawaiian property law is true, there has been no one, let alone an "expanded class" of native gatherers, issued "a government license" to intrude upon Nansay's claimed land. *See Yee v. City of Escondido*, 503 U.S. 519, 532 (1992). Nansay's "physical occupation" claim, and its contention that this case "is analytically indistinguishable from *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831 (1987)" (Pet. at 23), is accordingly without merit. *See Nollan*, 483 U.S. at 832 & n.1.

In short, Nansay's claims are ripe only if this Court wished to indulge broad facial attacks on general state-law property doctrines that may have no effect at all when, on remand, relief for one party or another is ordered. Nothing in this Court's jurisprudence, recent or otherwise, suggests any member of this Court shares – or should share – this desire. Here, Nansay "must establish

that no set of circumstances exists under which the [opinion below] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). Given Nansay's options, this test cannot be met. Indeed, even if Nansay has been prejudiced by the "law of the case," there are simply "too many 'ifs' " surrounding its claims to warrant review. *California v. Rooney*, 483 U.S. 307, 313 (1987) (per curiam). This Court "cannot know the extent of the injury suffered" by Nansay as a result of the judgment below; there is no ripe claim. *See Robinson v. Ariyoshi*, 887 F.2d 215, 218 (9th Cir. 1989). Review should thus be denied.

B. Even if Petitioner Somehow Stated a Ripe Federal Claim, The Supreme Court of Hawaii's Articulation of General Rules Governing Native Hawaiian Gathering Rights is Well Within Any Conceivable Formulation of the State Courts' Authority to Resolve Difficult and Unique Questions of Property Law.

Focusing mainly on two asserted "changes made by the *PASH* court" to the contours of native Hawaiian gathering rights, Nansay asserts that "the custom doctrine has been distorted in Hawaii out of all reasonable juridical recognition." Pet. at 14. This assertion is simply false. There is no basis for review.

First, Nansay's claims fail given *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988), which held that every State upon entering the union takes "title to lands lying under waters that [are] influenced by the tide," regardless whether such waters are "navigable in fact." *Id.* at 472. This case is indisputably about tidally influenced lands, which were conveyed to Hawaii upon statehood. *See* Pub. L. 86-3, 73 Stat. 4 (Mar. 18, 1959). And, as this Court has made clear, how particular facts "would transfer ownership of these lands from the State to petitioners is a question of state law." 484 U.S. at 484. State court power to define local law is at its height in this case. *See PASH II*, 79 Haw. at 436 n.20, 903 P.2d at 1257 n.20.

Second, Nansay's theory, if accepted by this Court, would go well beyond any arguable basis for limiting state court authority to define "property," and would make a whole range of accepted judicial methods unconstitutional. For example, Nansay's attack on the asserted "expansion" of Hawaiian customary rights to those who do not actually own land within a particular land district flows from an interpretation of the *Kalipi* opinion that ignores both that that opinion arose out of particular concessions made by the plaintiff there, and the fact that such ownership-based requirements are at odds with the requirement of custom as a general matter. *Kalipi*, as noted above, was very clear that claims of native Hawaiian gathering rights "would, of course, depend upon the particular circumstances of each case," 66 Haw. at 12, 656 P.2d at 749-50, and that fact should end any claim of judicial taking. Indeed, at worst, the Hawaii Supreme Court's earlier cases "had indicated a tentative quality in [their] pronouncements," and clarification of the law, even limiting past cases to their facts, plainly "rest[s] on a fair and substantial basis." *Demorest v. City Bank*, 321 U.S. 36, 43 (1942).

Even less persuasive is Nansay's argument that *Kalipi*'s *dicta* concerning the scope on gathering rights on developed land, bound the state courts to enshrine, as an inalterable "rule of property," the idea that landowners, in the face of gathering rights, had a vested right to "destroy gatherable items," or "develop their land" "with impunity" (Pet. at 25). As the Hawaii courts held here, *see PASH I*, 79 Haw. at 253, 900 P.2d at 1320, no court decision had addressed a case actually involving the interaction of the "right to gather" and the "right to develop," and, hence, nothing in *PASH II* actually "overrule[d] any holding of th[e Hawaii Supreme] Court." *Sandin v. Conner*, 115 S. Ct. 2293, 2300 n.5 (1995). At worst, Nansay attacks "abandonment" of a particular "methodology" – a process that is well accepted in the law when new cases

indicate that the Court "has strayed from the real concerns" of past cases. *Id.* at 2300 & n.5. *Cf. Lucas*, 505 U.S. at 1031 (noting "changed circumstances or new knowledge may [even] make what was previously permissible no longer so").

Even if this Court might be prepared some day to recognize the doctrine of "judicial taking" set out in Justice Stewart's concurrence in *Hughes v. Washington*, 389 U.S. 290, 296 (1967) (Stewart, J., concurring), there are no good reasons to do so in this case. Here, the Hawaii Supreme Court was well aware of Nansay's theory, and held that the mere "recognition" of certain general principles governing gathering claims did not, in and of itself, amount to a "judicial taking." *PASH II*, 79 Haw. at 451, 903 P.2d at 1272. This Court's Rule 10 admonishes that "certiorari is rarely granted when the asserted error consists of . . . misapplication of a properly stated rule of law." Under Nansay's own theory, only such a "misapplication" is at issue.

This Court should also be reluctant to grant review given the harm that could be inflicted by an uninformed resolution of the "judicial taking" issue. As this Court said 65 years ago:

> The process of trial and error, of change of decision in order to conform with changing ideas and conditions, is traditional with courts administering the common law. Since it is for the state courts to interpret and declare the law of the State, it is for them to correct their errors and declare what the law has been as well as what it is. State courts, like this Court, may ordinarily overrule their own decisions without offending constitutional guarantees, even though parties may have acted to their prejudice on the faith of the earlier decisions.

Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673, 681 n.8 (1930). Judicial "legislation" was a concept foreign to the Framers, who would have viewed it odd that courts

could be held to "take" property by construing statutes upon which the system of property came into being. *See Linkletter v. Walker*, 381 U.S. 618, 622-23 (1965). Judicial decisions in property law, as elsewhere, are presumed to "operate retrospectively." *United States v. Security Industrial Bank*, 459 U.S. 70, 79 (1982). The protection against judicial changes in property law is not a "just compensation" suit, but title insurance. *See* Brown, *Insured Legal Opinions*, 1961 Ins. L.J. 712. "Mistaken applications of the law are inevitable, but no principle of constitutional law requires compensation for every mistake." *In re Chicago, Milwaukee, St. Paul & Pacific Railway*, 799 F.2d 317, 327 (7th Cir. 1986). *See also Corporation of the Presiding Bishop v. Hodel*, 637 F. Supp. 1398, 1407 (D.D.C. 1986), *aff'd*, 830 F.2d 374 (D.C. Cir. 1987).

To date, although sporadic mention has been made in court decisions of the "judicial taking" theory, no federal court of appeals or state court of last resort has ever ultimately invalidated a state court decision as a "judicial taking." There is thus no conflict even in approach between the decision below and any of the appellate courts that have spoken on this issue. That fact demonstrates that, in general, and in the instant case, state judges have taken seriously their duty to "enforce the supreme law of the land." *See Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 240 & n.1 (1985). If this Court does address the "judicial taking" issue anew at the behest of a private litigant who has lost a property case, it should only be where the aggrieved landowner has presented a truly compelling argument that review will result in the correction of the state court. Nansay has failed to do so, and, in the end, its petition both flies in the face of precepts of federalism, and wrongly "denigrates the judges who serve on the state courts." *Id.*[6]

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[6] Petitioner asserts that "[t]wo" of the Supreme Court of Hawaii's decisions concerning Hawaiian land tenure have been "successfully challenged" under the "judicial takings" theory

CONCLUSION

For the reasons above, the petition should be denied.

Dated: Honolulu, Hawaii, March 21, 1996.

MARGERY S. BRONSTER
Attorney General
State of Hawaii

STEVEN S. MICHAELS*
Deputy Attorney General
State of Hawaii
**Counsel of Record*

Department of the
Attorney General
425 Queen Street
Honolulu, Hawai'i 96813
(808) 586-1383

Counsel for the
State of Hawaii

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presented in this case. Pet. at 22 n.12. This statement is in part totally false, and in part a half truth. The judgment in *Robinson v. Ariyoshi*, 441 F. Supp. 559 (D. Haw. 1977), was ultimately vacated by this Court, *see* 477 U.S. 902 (1986), and reversed by the Ninth Circuit, *see* 887 F.2d 215 (9th Cir. 1989), *attorneys' fee award also reversed*, 933 F.2d 781 (9th Cir. 1991). Although the District Court's judgment in *Sotomura v. County of Hawaii*, 460 F. Supp. 473 (D. Haw. 1978), was not reversed or vacated, that result is attributable to the defendants' failure to timely appeal. 679 F.2d 152 (9th Cir. 1982). Petitioner does not contend that *Sotomura* is preclusive of the issue here, nor could it be. *See United States v. Mendoza*, 464 U.S. 154 (1984).

Supreme Court, U.S.
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No. 95-1159

In The

Supreme Court of the United States

October Term, 1995

NANSAY HAWAII, INC.,

Petitioner,

v.

PUBLIC ACCESS SHORELINE HAWAII,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Hawai'i

REPLY TO BRIEF IN OPPOSITION

ROY A. VITOUSEK, III
Counsel of Record
CADES, SCHUTTE, FLEMING & WRIGHT
Suite B-303 Hualalai Center
75-170 Hualalai Road
Kailua Kona, Hawai'i 96740
(808) 329-5811

DAVID J. BEDERMAN
Of Counsel
Gambrell Hall
Atlanta, Georgia 30322-2770
(404) 727-6822

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REPLY TO BRIEF IN OPPOSITION

Pursuant to Supreme Court Rule 15.6, the Petitioner, Nansay Hawaii, Inc., respectfully submits this Reply to Brief in Opposition.

ARGUMENT

THE HAWAI'I SUPREME COURT'S DECISION IS FINAL AND RIPE FOR REVIEW

1. Respondent, Public Access Shoreline Hawaii (PASH), suggests in its Brief in Opposition that Petitioner's takings claim is unripe. PASH deliberately obscures the point that Nansay is not raising in this Petition a regulatory takings claim. The precedent that PASH relies upon for its assertion is thus inapposite. The only case that PASH cites, *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), concerned a regulatory taking, not a physical occupation of property. See id. at 186.

As Nansay carefully pointed out in its Petition, at 25 n.13, the injury that it has sustained as a consequence of the Hawai'i Supreme Court's decision is not that its planned development will be the subject of unconstitutional conditions. Rather, the injury Nansay complains of, and the one the Hawai'i Supreme Court itself acknowledged as imposing in its opinion, is that Nansay will now suffer the physical intrusion onto its property of a vastly expanded and inchoate class of native Hawaiians, individuals who can assert enlarged and indefinite gathering and traditional rights. *PASH*, 903 P.2d at 1260; Pet. 29a-30a. Such an encroachment had not been previously

sanctioned by Hawaiian law. Irrespective of whether Nansay is ultimately precluded from developing its property, it has suffered the real and present injury of having to submit to the physical occupation of its land.

The Hawaii Supreme Court's decision also changed the essential nature of gathering rights to give gatherers the right to restrict or prevent a land owner from developing land where gathering takes place. Previous opinions of the Hawaii Supreme Court stated clearly and unequivocally that gathering rights "do not prevent owners from developing land." *Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 656 P.2d 745, 749 n.2 (1982). Thus, the Court's declaration of Hawaii property law is final and has authorized invasion and occupation of Nansay's property by more people who hold broader rights than previously established.

2. Likewise, PASH's assertion that the Hawai'i Supreme Court's decision is not final under 28 U.S.C. 1257(a), is unavailing. PASH's jurisdictional point would only be well-taken if Nansay were raising a regulatory takings claim, which it is not. Nevertheless, PASH insists that because the Hawai'i Supreme Court remanded the case for further proceedings, this is a conclusive bar to finality.

The finality requirement has always been given a "practical rather than a technical construction" by this Court. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949); see also *Bradley v. School Bd. of City of Richmond*, 416 U.S. 696, 722-23 n.28 (1974). Moreover, this case arises in a similar posture as *North Dakota State Bd. of Pharmacy v. Snyder's Drugs Stores, Inc.*, 414 U.S. 156 (1973).

There a state court had passed on the issue whether certain property rights were protected under the federal constitution, and then remanded the case for further proceedings to grant or deny a permit on the assumption that that decision, and any subsequent appeal, could only be challenged on state law grounds, and that the federal issue was foreclosed. This Court held that the judgment on the federal constitutional grounds was final for purposes of review under 1257(a). See id. at 159-64; see also *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479-85 (1975).

Likewise, the PASH decision is conclusive and final as to the Hawaiian courts' rejection of Nansay's claim that granting a broad, customary right to an indeterminate class of native Hawaiians imposes an impermissible servitude on land, in violation of the Fifth and Fourteenth Amendments. The Hawai'i Supreme Court's own, concluding language in its opinion rings with finality on this point: "[T]his decision does not effect a judicial taking of Nansay's private property because it is grounded in preexisting principles of State property law." 903 P.2d at 1273, Pet. 63a. It is manifest that, after this final decision, Nansay will not be permitted to renew its federal constitutional claims for deprivations of due process[1] or a

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[1] In their Brief in Opposition, PASH asserts that Petitioner Nansay Hawaii, Inc., failed to raise the issue of a due process violation before the Hawaii Appellate Court. See Op. Cert. at 4, n.3. This is clearly and obviously incorrect. Petitioner raised and argued the due process issue in its briefs before the Hawaii Supreme Court, cited those arguments in the Petition for a Writ of Certiorari to this Court (p. 10) and included relevant portions of the appellate briefs in the Petition Appendix (see, e.g. 159a-161a).

physical taking arising from this refashioning of state property law. The issue of finality should not bar this Court's granting the Petition, if it is otherwise disposed to do so.

Respectfully submitted,

ROY A. VITOUSEK, III
Counsel of Record
CADES, SCHUTTE, FLEMING & WRIGHT
Suite B-303 Hualalai Center
75-170 Hualalai Road
Kailua Kona, Hawai'i 96740
(808) 329-5811

DAVID J. BEDERMAN
Of Counsel
Gambrell Hall
Atlanta, Georgia 30322-2770
(404) 727-6822